(16,864.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 290.

THE CANADA SUGAR REFINING COMPANY, LIMITED, PETITIONER,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE CANADA SUGAR REFINING COMPANY, LIMITED, Libellant, Appellee,
vs.
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent, Appellant.

Transcript of Record.

Appeal from the district court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Dec. 7, 1897. William Parkin, clerk.

1 U. S. District Court, Southern District of New York.

THE CANADA SUGAR REFINING COMPANY, LIMITED, Libellant & Appellee,
against
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent & Appellant.

Statement.

1894.
Nov. 27. Libel filed.
1895.
Jan. 28. Answer filed.
1896.
Dec. 7. Cause tried before Hon. Addison Brown, U. S. district judge.
1897.
June 3. Opinion rendered directing decree to be entered for libellant, with costs.
" 15. Final decree entered.
" 16. Notice of appeal filed.

2 To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

The libel and complaint of The Canada Sugar Refining Company, Limited, against The Insurance Company of North America, in a cause of contract civil and maritime, alleges and articulately propounds as follows, to wit:

First. At all the times hereinafter mentioned the libellant was, ever since has been and still is a corporation organized and existing under and pursuant to the laws of the Dominion of Canada, and there engaged in the importation of raw sugars and the refining

thereof, and that at all such times the respondent was, ever since has been and still is a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania and lawfully engaged among other things in the business of marine insurance.

Second. At divers times between the 20th of January, 1893, and the 8th of February, 1893, the libellant caused to be shipped to Iloilo, for its account, by Ker & Co., of Iloilo, upon the British ship *John E. Sayre* 73,089 mats of Iloilo sugar, weighing net about 39,360 piculs, being about 2,462 tons, to be delivered at Montreal, Canada. The said sugar was shipped in three separate lots, of which bills of lading were issued of which copies are hereto annexed marked respectively A, B and C.

Third. The libellant further alleges that the net invoice cost of all such sugar was £22,152, 13/, 8d, as appears by the invoices issued therefor, copies of which are hereto annexed marked respectively D, E and F.

Fourth. The libellant further alleges that at divers dates, to wit: December 9th, 1892, and in March, 1893, and in April, 1893, it caused said sugars to be insured by the Atlantic Mutual In-
3 surance Company to cover from time to time the increased market value of said sugar, the market therefor being a rapidly rising market, and that the insurance of said sugar by the libellant with the Atlantic Mutual Insurance Company was finally completed on the 29th day of April, 1893, at $166,145, the said *John E. Sayre* then being at sea bound on her voyage from Iloilo to Montreal.

Fifth. The libellant further alleges that on the 29th day of April, 1893, the said *John E. Sayre*, being at sea as aforesaid, and the value of said sugar exclusive of freight being then about $181,000, a value in excess of the amount for which it had been purchased by the libellant, and a value in excess of the insurance placed thereon by the libellant with the Atlantic Mutual Insurance Company, the libellant caused its said profits upon the said sugar, being then valued at $15,000, to be insured by the respondent, The Insurance Company of North America, in said valued amount of $15,000, for the voyage from Iloilo to Montreal under a certificate of insurance issued to libellant, of which a copy is hereto annexed marked G.

Sixth. The libellant further alleges that Robert Hampson, by whom the said certificate of insurance was issued on behalf of the respondent, was the agent of the respondent, and that the policy of insurance No. 117,407 referred to in said certificate of insurance was an open policy of insurance under which insurance generally was written by the said Robert Hampson on behalf of the respondent in lieu of issuing policies of insurance to special persons insured. The libellant further alleges that said policy No. 117,467 is not and never has been in the possession of libellant, but has been and still is, as deponent is informed and believes, in the possession of the Insurance Company of North America or of the said Robert Hampson, its agent, and that the libellant has been unable to procure a copy of the said policy of insurance, though it has applied to the

said Robert Hampson therefor, and that the libellant is not advised as to all the terms and conditions of said policy of insurance.

4 Seventh. The libellant further alleges upon information and belief that the said ship *John E. Sayre*, being then in every way fitted for her contemplated voyage, sailed from Iloilo with said sugar on board on or about the 10th day of February, 1893, bound for Montreal; that on or about the 4th day of July, 1893, the said ship being still in prosecution of her voyage, met with heavy fog off the coast of Newfoundland, and in the early morning of July 6th during the prevalence of said fog stranded on the coast of Newfoundland about eleven miles east of Cape Ray and about one mile east of the entrance to Port au Basque harbor, and that she subsequently at said place of stranding became a total wreck. The libellant further alleges that on the 6th day of July, and immediately upon receiving advices of the distress that had come to the said ship *John E. Sayre* it informed the said underwriters thereof, and the said Atlantic Mutual Insurance Company, either by itself or in conjunction with the respondent, assumed and undertook to take such possession of said cargo as was possible, and dispatched vessels to the relief of the *John E. Sayre*, and in conjunction with the master of said vessel employed salvors to save the cargo, under an agreement as libellant is informed and believes that the salvors being resident in Newfoundland should receive one-half of said cargo or the value thereof as salvage compensation, besides which the said underwriters incurred other expenses in the employment of vessels and agents and surveyors, in addition to the obligations incurred under said agreement with the said salvors resident in Newfoundland, the amount of which expense is unknown to the libellant; that by these efforts a certain amount of said cargo, to wit: about 9,900 mats, weighing about 325 tons, were taken out of the said *John E. Sayre* by small sailing craft and landed in Newfoundland, and that pursuant to the terms of said salvage agreement the said salvors resident in Newfoundland became entitled to receive one-half thereof as salvage compensation; that thereafter as libellant is informed and believes the said insurers adjusted the claims and

5 rights of the said salvors by a cash payment to them, the exact amount of which is to deponent unknown, the same being, however, substantially one-half of said sugars, and that thereupon the said underwriters brought the said 325 tons of sugar to Montreal incurring expenses therefor, the amount of which is unknown to libellant, where it was received by the libellant, on account of and in part payment for the loss sustained by the said libellant, under its insurance with the Atlantic Mutual Insurance Company, and that credit was given therefor to the said Atlantic Mutual Insurance Company in the amount at which the said 325 tons of sugar were insured with the Atlantic Mutual Insurance Company; that the market value of the said 325 tons of sugar in Montreal at the time it was received by the libellant was about $20,000.

Eighth. The libellant further alleges that at the time of the loss aforesaid the entire shipments of sugar as aforesaid upon the said

John E. Sayre were with all the profits thereon for the account of and at the risk of the libellant, and that by reason of the premises and matters aforesaid the said profits became and were totally lost to the libellant.

Ninth. The libellant further alleges that on the 10th day of January, 1894, it caused to be submitted to the respondent a claim for the loss of said profits for examination, and that at that time and at subsequent times immediately following the libellant tendered to the respondent and to its agents and representatives all documents of which copies are hereto annexed together with a copy of the marine protest extended by the master of the *John E. Sayre*, setting forth the circumstances of the voyage, but that only certain documents, to wit: a copy of the certificate of insurance and a copy of the said protest, were retained by said respondent and its agents, the statement being then made by them that the other documents were not needed for the consideration of the claims involved.

6 Thereafter the respondent held the matter under advisement until the 6th day of August, 1894, at which time it informed the libellant that it declined paying the claim, and upon the 15th day of August, 1894, made objection that no proof of interest of the libellant in said profits had been filed, and that no proof that such profits had become a total loss had been filed, whereupon and on or about the 23rd day of August, 1894, the libellant caused complete proofs of loss to be served upon the respondent.

Tenth. The libellant further alleges that the respondent has declined to pay the claim, and that there is now due and owing to the libellant thereunder the sum of $15,000 with interest thereon from the 15th day of January, 1894.

Eleventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, the libellant prays that the respondent may be cited to appear and answer all and singular the matters aforesaid, and that judgment may be entered in favor of the libellant and against the respondent for the amount of its claim as aforesaid with interest and costs.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellant, 54 *Wall Street, N. Y. City.*

7 CITY AND COUNTY OF NEW YORK, } ss.:
Southern District of New York, }

Samuel Lee, being first duly sworn, deposes and says that he is a member of the firm of Hewlett & Lee, agents of the libellant above named, that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

Deponent further says that the sources of his information and the grounds of his belief as to all matters not stated of his own knowledge are statements made and reports furnished to him by representatives of the libellant after investigation by them into the

circumstances attendant upon the matters stated in the foregoing libel, and the possession of documents relating to the same; that the reason why this verification is not made by the libellant is that it is a foreign corporation none of whose officers reside within the southern district of New York or within the United States or are capable of making this affidavit.

SAMUEL LEE.

Sworn to before me this 27th day of Nov., 1894.

WM. F. JUDSON,
Notary Public, Westchester County.

Certificate filed in N. Y. Co.

8 "A."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre* whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal.

I.	3,850 mats.	Forty-three thousand five hundred mats.
II.	3,900 "	Iloilo superior sugar wg. nett 22,617.08 pcls.
III.	35,750 "	
	43,500 mats.	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal, or to their assigns, he or they paying freight for the said goods at the rate of ($7¼) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 21st January, 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE, *Master.*

9 "B."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre* whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal.

A	1,681 mats.	Thirteen thousand six hundred and twenty-four
B	3,374 "	mats Iloilo superior sugar wg. nett 8,000 piculs.
C	8,569 "	
	13,624 mats	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and

accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7½) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 1st February, 1893.

Weight and contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

10 "C."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre* whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal,

I	4,030 mats.	Fifteen thousand nine hundred and sixty-five	
II	10,340 "	mats Iloilo superior sugar wg. nett	8,742.92
III	1,595 "	piculs.	
	15,965 mats		

being marked and numbered as in the margin; and are to be delivered in the like good order and well condition (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7½) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master and purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 8th February 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

11 "D."

British ship *John E. Sayre*, Rouse,

Montreal,

the concerned.

Messrs. The Canada Sugar Refining Co., Ltd.
Messrs. The Bank of Montreal.

Iloilo superior sugar.

I	3,850 mats, wg. net.....	1,841.73	piculs.
II	3,900 " " "	2,015.43	"
III	35,750 " " "	18,759.92	"
	43,500 mats, wg. net.....	22,617.08	piculs.

Or 1,413^{5675} tons at £10:10 p'r ton cost & freight £14,842/ 9/ 2
Less freight at $7 1/4 p'r ton=$10,248.36 U. S. gold coin at exchange of $4.85 per £..... 2,113/11/ 3

$12,729/ 7/11

E. & O. E.

Manila, 26th January, 1893.

12 "E."

British ship *John E. Sayre*, Rouse,

Montreal,

the concerned.

Messrs. The Canada Sugar Refining Co., Ltd.
Messrs. The Bank of Montreal.

Iloilo superior sugar.

A	1,681 mats, wg. net.....	1,000 piculs.
B	3,374 " " "	2,000 "
C	8,569 " " "	5,000 "
	13,624 mats, wg. net.....	8,000 piculs.

Or 500 tons at £10:10 p'r ton cost and freight..... £5,250
Less freight at $7 1/4 p'r ton = $3,625 at exchange of $4.85 per £..... 747/ 8/5

£4,502/11/7

E. & O. E.

Manila, 4th February, 1893.

KER & CO.
JAMES M. BEATTIE.

13 "F."

(Copy.)

Invoice of produce shipped by Ker & Co. on board the British ship *John E. Sayre*, Rouse, master, bound for Montreal, for account and risk of the concerned by order of Messrs. The Canada Sugar Ref'g Co., Ltd., and consigned to Messrs. The Bank of Montreal.

Iloilo superior sugar.

I	4,030 mats, wg. net.....	2,078.27	piculs.
II	10,340 " " "	5,824.57	"
III	1,595 " " "	840.08	"
	15,965 mats, wg. net.....	8,742.92	piculs.

Or 546^{4325} tons at £10.10 p. ton cost of freight... £5,737.10.10
Less freight at $7¼ p. ton=$3,961.64 at exchange of
$4.85 p. £..... 816.16. 8

£4,920.14. 2

E. & O. E.

Manila, 11th February, 1893.

KER & CO.
JAS. M. BEATTIE.

14 "G."

Marks and numbers.

Insurance Company of North America.

$15,000. Philadelphia. No. 39600.

This to certify, that on the 29th day of April, 1893, this company insured under policy No. 117,407, made for Robert Hampson, fifteen thousand and 00/100 dollars on profits on cargo sugar against total loss only valued at sum insured shipped on board of the Br. ship *John E. Sayre* at and from Iloilo to Montreal and the loss, if any subject to the terms and conditions of the policy, has been made payable to the order of Canada Sugar Ref'g Co., Ltd., on surrender of this certificate. Grentler Fryer, secretary. Wm. A. Platt, 2nd vice-pres't. Not valid unless countersigned by the company's duly authorized agent at Montreal. Countersigned at Montreal this 29th day of April, 1893.

$
at
per cent.
Premium
$

ROBERT HAMPSON, *Agent.*

Incorporated 1794.

(Endorsed:) Libel. Filed Nov'r 27, 1894.

15 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of the respondent, The Insurance Company of North America, to the libel and complaint filed in this court against it by the Canada Sugar Refining Company, Limited, respectfully showeth as follows, namely:

First. This respondent admits the averments of the first article of the libel and complaint respecting the incorporation of the libellant and the incorporation of the respondent.

Second. This respondent is informed and believes that between the date mentioned in the second article of the libel, the libellant caused to be shipped at Iloilo, upon the British ship *John E. Sayre*, to be delivered to the libellant at Montreal, Canada, about seventy-three thousand and eighty-nine mats of Iloilo sugar, but as to the exact amount or weight thereof, or as to the manner of its shipment

or the bills of lading issued therefor, or as to the net invoice cost of such sugar, this respondent has no knowledge or information sufficient to form a belief.

Third. This respondent is informed and believes that the libellant caused such sugar, or some portion thereof, to be insured by the Atlantic Mutual Insurance Company, but as to the dates of such insurance, or the amount thereof, or whether such insurance was to cover from time to time the increased value of such sugar, or whether the market therefor was a rapidly rising market, this respondent has no knowledge or information sufficient to form a belief.

Fourth. This respondent admits and alleges that on or about the 29th day of April, 1893, under and by certificate of insurance issued therefor by this respondent, and of the date last mentioned,
16 the libellant caused to be insured by this respondent under its open policy of insurance No. 117,407, made and issued by it to Robert Hampson and subject to the terms and conditions thereof fifteen thousand dollars on profits on cargo of sugar against total loss only valued at the sum insured, shipped on board the British ship *John E. Sayre*, at and from Iloilo to Montreal, the loss, if any, subject to the terms and conditions of such policy, to be paid to the order of the libellant upon surrender of the said certificate. But while admitting that at the time of such insurance the value of the said sugar exclusive of freight was about one hundred and eighty-one thousand dollars this respondent has no knowledge or information sufficient to form a belief as to whether such value was in excess of the amount for which it had been purchased by the libellant, or was in excess of the insurance placed thereon by the libellant with the Atlantic Mutual Insurance Company. And this respondent avers that while as it believes Schedule "G," annexed to the libel is substantially a copy of the said certificate, yet the name of the secretary signing the same is therein incorrectly stated and for greater certainty in respect to its purport and provisions this respondent prays leave to refer to the original thereof when produced on the trial.

Fifth. This defendant is informed and believes that the said ship *John E. Sayre* sailed from Iloilo with sugar on board on or about the 10th day of February, 1893, bound for Montreal. That on or about the 6th day of July, and while in the prosecution of the voyage she stranded and became a wreck on the coast of Newfoundland; and this respondent is informed and believes that by or under direction of the master and in discharge of his duty as such and for account of whom it might concern salvage efforts were prosecuted for relief of the said *John E. Sayre* and her cargo and the partic-lars of which efforts or the terms or mode of prosecution whereof and the agreements, credits and payments, if any, made under or in respect
17 of the same are unknown to this respondent who in nowise participated therein. And this defendant also denies that such salvage efforts were by direction or authorization of or in conjunction with this respondent. And, except as in this article admitted, this respondent denies any knowledge or information sufficient to form a belief as to each and every other allegation contained

in the seventh article of said libel. And while admitting upon information and belief that the shipments of the sugar with the profits thereon were for account of and at the risk of the libellant, this respondent denies any knowledge or information sufficient to form a belief as to whether or not the said profits were totally lost to the libellant.

Sixth. This respondent further admits and avers upon information and belief, that from the wreck of said ship *John E. Sayre* there were forwarded to Montreal, the place of destination, and there delivered to and received by the libellant about nine thousand nine hundred mats of the said sugar of about three hundred and twenty-five tons net weight, and of the value of about twenty thousand dollars. This deponent further alleges that no abandonment of the subject of such insurance was ever offered or made by the libellant to this respondent; and this respondent avers and insists that by reason of that saving and delivery to the libellant of a substantial part of the said cargo as above set forth, this respondent became relieved and discharged from all liability to the libellant under or by reason of its said contract of insurance, and that the claim of the libellant in this suit cannot be maintained.

Seventh. This respondent upon information and belief denies that the sugar so delivered to the libellant was a payment by any underwriter on account of a supposed total loss. And this respondent is advised and believes that there was no total loss of profits within the intent and purport of such insurance thereof.

18 Eighth. While admitting that the libellants caused to be served upon this respondent papers purporting to be proofs of loss this respondent claims and insists that such papers failed to prove or show any liability by the respondent to the libellant.

Ninth. This respondent admits that it has declined to pay the claim of the libellant, but it denies that there is now due or owing by the respondent to the libellant the sum of fifteen thousand dollars and interest, or any sum whatever.

Tenth. This respondent is advised and believes that the allegation contained in said libel as to the agency of Robert Hampson and the possession of the policy of insurance, and the allegations contained in the ninth article of the libel, other than the allegation as to service of proofs of loss on the 23rd day of August, 1894, are all immaterial to the issues herein, and call for no denial, explanation or notice on the part of the respondent.

Wherefore, this respondent prays this honorable court to pronounce against the libel aforesaid, and to condemn the libellant in costs and otherwise law and justice to administer in the premises.

HAND & BONNEY,
Proctors for Respondent, 51 *Wall Street, New York.*

19 SOUTHERN DISTRICT OF NEW YORK, *ss:*

John S. Jeremiah, one of the firm of Catlin & Platt, being duly sworn, says that he is an attorney-in-fact of The Insurance Company of North America, the above-mentioned respondent; that he has

read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief. That the reason this verification is not made by the respondent is that such respondent is a foreign corporation, and that neither of its officers resides or is within this district. That deponent's knowledge and information are derived from documents, letters and information received from the officers of the respondent, and from papers and information received from the libellant.

JOHN S. JEREMIAH.

Subscribed and sworn to this 28th day of January, 1895, before me,

W. D. DESPARD,
[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county.

(Endorsed:) Answer. Filed Jan'y 28, 1895.

20 United States Circuit Court, Southern District of New York.

CANADA SUGAR REFINING CO.
vs.
THE INSURANCE COMPANY OF NORTH AMERICA.

Transcript of Judge Brown's Minutes of Trial.

Libellant offered deposition of George A. Drummond.
All objections reserved.
Deposition of A. T. Rouse, and Exs. A, B and C.
October 10, 1895, bill of lading.
Deposition of Aug. W. Harvey and R. E. Pike & exs., St. John.
Offers policy of Atlantic Mutual Company. Ex. 9.
Received subject to objection.
The libellant desires to prove further by Drummond that when he took out a policy on profits he advised the defendant that he had a policy of $166,145 on the sugar with the Atlantic Mutual Company.
Admitted that Mr. Drummond would so testify if present, with the privilege to the defendant to contradict that testimony, if desired.
Proof of loss offered; served on defendant company August 23, 1894, Ex. 10.
Admitted that these papers were served on that day, and that they are sufficient if the libellant is entitled to recover on the merits.
Copy of policy No. 117,407 issued by respondent produced and marked Ex. 11.
Defendant offers no proofs.
Both rest.

21 District Court of the United States for the Southern District of New York.

CANADA SUGAR REFINING COMPANY, Libellant,
against
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent.

Deposition of George Alexander Drummond, taken this ninth day of November, 1896, pursuant to notice, at the office of Messrs. Butler, Notman, Joline & Mynderse, No. 54 Wall street, New York city.

Present: Mr. Mynderse, for libellant.
Mr. Bonney, for the respondent.

GEORGE ALEXANDER DRUMMOND, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. MYNDERSE:

Q. Where is your residence, Mr. Drummond?
A. Montreal, Canada.
Q. What is your association with the Canada Sugar Refining Company?
A. I am president of that company.
Q. How long have you been president of that company?
A. I should think—I really don't remember; certainly twenty years nearly.
Q. That company is a manufacturing corporation?
A. Yes.
Q. Engaged in the refining of sugars?
A. Yes.
Q. What did that company have to do with a cargo of the *John E. Sayre*, shipped at Manilla?
A. We bought it.
22 Q. From whom?
A. Ker & Company.
Q. How did you pay for it?
A. It was paid for by a credit granted by the Bank of Montreal.
Q. (Handing witness papers.) Are these the invoices of the shipments?
A. Yes; I take them to be so.
Q. And do those invoices show the purchase price?
A. They do.

The three papers are marked respectively Libellant's Ex. 1, 2, and 3 of this date.

Q. (Handing witness papers.) I show you these papers, heretofore marked Exhibits A, B, and C of October 15, 1895, and ask you if those are the bills of lading covering the shipment?
A. Yes, they are.
Q. From whom, or through whom, did you receive these bills of lading?

A. The bills of lading I have no doubt came through the Bank of Montreal.

Q. And were taken up by you on paying the credit?

A. On paying the credit.

Q. Do you recall how early you purchased this sugar?

A. I do not; it is usually purchased by cable, but I forget the date of this; it was somewhere in the end of 1892.

Q. When did you first effect any insurance on the sugar, either by application or by formal policy?

A. We applied on the 9th of December, 1892, for insurance in the Atlantic Mutual Insurance Company.

Q. On what amount, or at what rate?

A. For the invoices' value, at the rate of $6.50 to the pound sterling; the total amounts stipulated by them not to exceed $185,000.

Q. At that time you did not know what the invoice value would be?

A. We knew what the invoice price would be, but no one could tell how much the ship would carry.

Q. You only knew the price per ton?

A. Only the price per ton.

Q. You say you arranged with them to insure you for the prospective invoice price at $6.50 per pound sterling?

A. Yes.

23 Q. Will you state whether that is the usual rate of allowance?

A. It is a very common rate.

Q. And intended to cover what?

A. It covers not only the invoice cost, but it covers the cost of the credit and the cost of the insurance against marine risks and the interest; all insurance questions.

Q. Did you afterwards make a change in this insurance with the Atlantic, or increase it in any way?

A. The market value of sugars began to rise considerably, and on the 30th of March we applied to the Atlantic for additional insurance, which was granted by them by increasing the value of the pound sterling to $7.50 instead of $6.50.

Q. Was that afterwards modified further, or what was done in the matter of taking out the policy?

Mr. BONNEY: I object to these dealings with the Atlantic, and except to them as immaterial, irrelevant and incompetent.

A. Still our interest at market valuations not being satisfied by that enhancement of the insurance by the Atlantic we effected a further insurance with the Insurance Company of North America, Philadelphia, in a round sum of $15,000.

Q. Prior to the time of taking out this insurance with the Insurance Company of North America, had your arrangements with the Atlantic crystallized at all?

A. Oh, I have no doubt they granted us a policy upon the terms already mentioned.

Q. That is, at the rate of $7.50 per pound sterling?

A. Yes.

Q. Do you recall the exact amount of that policy, whether it was $166,145?

A. $166,145 I think.

Q. That was the invoice of values of the sugar as per the invoices which we have seen, at the rate of $7.50?

A. Yes.

Q. Do you recall the date that that policy bore?

A. It must have been about the end of April I should think, but I am not very certain.

24 Q. You have spoken of taking out insurance with the Insurance Company of North America in the amount of $15,000?

A. Yes, sir.

Q. (Handing witness paper.) Is that represented by the certificate of insurance I now show you?

A. Yes, sir.

Mr. MYNDERSE: This the original.

The paper is marked Libellant's Ex. 4 of this date.

Q. What was the occasion of taking out this insurance of $15,000?

A. The reason for it?

Q. Yes.

Same objection as heretofore stated.

A. The amount covered by the Atlantic was not sufficient.

Q. The sugar had increased in value?

A. Yes.

Q. Mr. Drummond, in these invoices I see that in each of them the sugars are styled "Iloilo superior sugars" and of grades 1, 2 and 3, or grades A, B, and C; are those grades of uniform value?

A. Approximately as near as can be. That is to say, the No. 1 grade is a recognized grade, No. 2 grade is a recognized grade, and No. 3, is a recognized grade; No. 1 being the more valuable of the three, No. 2 next, and No. 3 the lowest quality.

Q. What I mean is, is there a difference between the values of Nos. 1 and 2 and Nos. 2 and 3?

A. Yes, but these sugars are sold in the markets under the description of "usual assortment" meaning one-eighth of the whole shipment to be No. 1, two-eighths to be No. 2 and five-eighths to be No. 3.

Q. And then the price is for——

A. The price is approximate, an average of the whole; based upon that average.

Q. Based upon such assortment?

A. Yes, the usual assortment.

Q. And the price is upon the aggregate weight?

A. The aggregate weight, as a whole.

25 Q. When did you first learn of the disaster to the *John E. Sayre?*

A. She went ashore on the 6th of July, 1893.

Q. When did you learn of that, do you recall?

A. We must have learned it on the 7th of July.
Q. Do you recall how you learned it?
A. I don't at the moment.
Q. What did you do upon learning it?
A. Immediately upon hearing it we telegraphed to the Atlantic Mutual Insurance Company; I think it was in the public prints it appeared first.
Q. Can you give me the language of your telegram of the 7th of July to the Atlantic Mutual?

Same objection as heretofore stated.

A. Our telegram as follows:

"The *John E. Sayre* reported ashore off coast of New Foundland."
(Signed) "REDPATH."

Q. Redpath is your cable or telegraph address?
A. Yes.
Q. (Handing witness paper.) Did you receive from the Atlantic Mutual any response to the telegram, and if so state whether this is it?

Mr. Bonney now states that he objects to all dealings with the Atlantic Mutual.
Mr. Mynderse states that of course all these proofs in respect to the Atlantic are taken subject to Mr. Bonney's objections, without the necessity of his renewing them further.

A. That is the letter.

The letter is marked Libellant's Ex. No. 5 of this date.

Q. Did you subsequently receive a further letter from them, and if so under what date?
A. The 10th of July we received that letter.

The letter referred to is produced and marked Libellant's Exhibit 6 of this date.

26 Q. Did you communicate with the Atlantic later?
A. Yes.
Q. On what day?
A. We telegraphed them on the 14th of July.
Q. What did you telegraph them?
A. We telegraphed that we had been offered, or inquiries were being made in Montreal as to the value of sugars similar to those carried by the *John E. Sayre*.
Q. Can you give me the language of the telegram?
A. This is the telegram:

"Sugar supposed *ex John E. Sayre* being offered here by brokers representing Newfoundland parties."
(Signed) "REDPATH."

Q. Did you confirm that at all by any letter of the same day?
A. I think so.
Q. (Handing witness paper.) Is this a copy of the letter?
A. This is a copy of the letter, yes.

The letter is marked Libellant's Exhibit No. 6*x* of this date.

Q. Did you receive replies by telegram and by letter from the Atlantic Mutual?
A. Yes.
Q. (Handing witness papers.) Are these the original telegram and letter?
A. Yes.

The telegram is marked Libellant's Exhibit No. 7 of this date, and the letter is marked Libellant's Exhibit No. 8 of this date.

Q. What was the next you heard of this sugar or any part of it?
A. The sugar was shipped to Montreal by the steamer *Tiber*. We were advised of that by the Atlantic—that it was coming.
Q. About how much of it?
A. Something over three hundred tons.
Q. Was that sugar consigned to you?
A. No; shipped to the Atlantic Mutual Insurance Company.
Q. What was done respecting that sugar?
A. When it arrived the Atlantic sent a representative to
27 Montreal, who received it and subsequently handed it over to us on a settlement.
Q. From Mr. Darragh?
A. Yes.
Q. On what basis of value did you receive that sugar from Mr. Darragh; do you remember?
A. I am not very sure; I think we took it approximately at its insured value, if I remember rightly.
Q. Was any examination made by you of the grades of the sugar which arrived, as to whether it was 1, 2 and 3 or not?
A. Impossible to do that; we took it as an average.
Q. It has been shown that certain of these bags of sugar were wet; was there any attempt by you made to adjust any item of loss in that respect accurately, with Mr. Darragh?
A. I don't think so.
Q. You took the whole thing in its existing condition and grade and quality?
A. Yes, we accepted it.
Q. At its insured value?
A. On—I think so.
Q. Well, was its actual value, in its existing grades and condition and quality substantially the same as the value insured in the Atlantic?
A I think most likely that we settled it on the nearest approach to a fairly equitable basis that we could reach.
Q. Did either you or the Atlantic try to stand on technical or legal grounds?

A. No, for very obvious reasons. If it had come to a market like this it could have found buyers, but in Montreal there was practically only one buyer.

Q. Is there no market there for sugar?

A. Not for such sugars.

Q. How do manufacturers get sugar there?

A. They have to bring it there themselves, by buying it outside.

Q. Then, as I understand, you took these sugars over from Mr. Darragh at their insured value, as fairly representing the then actual value?

A. Yes.

Q. What kind of sugar is this Iloilo sugar?

A. A low brown sugar averaging probably, take the three qualities together, a polarization of 82½ to 83 per cent. of crystallizable sugar.

Q. Had you any transactions whatever with the owners of the *John E. Sayre?*

A. None.

28 Q. Had you had any communication with them respecting the forwarding of the sugar?

A. No.

Q. Who attended to that?

A. The Atlantic Mutual Insurance Company.

Q. Did you have any arrangements with the Atlantic respecting the handling of the sugar other than appears in this correspondence?

A. Nothing whatever; they told us that they had made certain arrangements and that is how we knew about it.

Q. Do you recall what the freight on the *Tiber* was for bringing the sugar forward from Newfoundland?

A. I do not—$1,327.51 was paid by us.

Q. That was at the rate of four dollars a ton?

A. (After examining papers.) Exactly so.

Q. What was the rate of freight per ton on the *John E. Sayre*, do you recall?

A. I think it was £1/10 per ton.

Q. $7.25 (handing witness paper to refresh his recollection)?

A. Yes, that is it; $7.25 per ton.

Q. Do you know who arranged the freight matters with the *John E. Sayre* respecting the sugars that came forward?

A. The Atlantic Mutual Insurance Company.

Q. Will you state whether you made any allowance to them in respect to the difference between the four dollars and the $7.25 per ton freight?

A. I think the difference was settled for in the settlement with Mr. Darragh.

Q. It was charged against you?

A. Yes, the original freight was charged.

Q. You say you paid the freight to the *Tiber* four dollars a ton; under what arrangement was that with Mr. Darragh?

A. Under the agreement we made with him for settling the whole

matter. I forget now; we accepted the sugar on a certain basis of settlement.

Q. Who was the agent of the Insurance Company of North America in Montreal?

A. I think Robert Hampson.

Q. Will you state whether you had any conferences or con-
29 versation with him during the period that this vessel was ashore in Newfoundland?

A. Nothing very important; I think he was in the office once or more times, and we gave him all the information we had, but I won't swear to anything specific on that matter.

By Mr. BONNEY:

Q. You don't remember, Mr. Drummond, anything that was said?

A. I don't remember anything very specific about it.

By Mr. MYNDERSE:

Q. You did see him, though?

A. Oh, I saw him, yes; he was very well known to us, and in and out of the office very frequently.

Q. Will you state that the position of the vessel and cargo was discussed by you and him upon the information then in your hands?

A. Yes, and he got everything we knew from time to time.

Q. What do you consider as to your legal rights in respect to this sugar when it came on to Montreal?

Objected to as immaterial, incompetent and irrelevant.

A. Practically the sugar was in the possession of the Atlantic Mutual Insurance Company, was their property; but as its coming to Montreal would have brought it to a place where practically there was no market for it we were obliged, or considered ourselves entitled to deal with it apart from any question of legal rights, on an equitable basis. We consequently arrived at a settlement as nearly mutually satisfactory as we could.

Q. When that sugar came there did you think it was yours or theirs?

Same objection.

A. It was theirs.

Cross-examined by Mr. BONNEY:

Q. The price that you say you paid for this sugar was the current market price?

A. At the time that this action was entered into.

Q. At the time the purchase was made?

A. At the time the purchase was made.

30 Q. To whom was this three hundred or so tons of sugar that was saved after the wreck of the *Sayre* shipped in Montreal?

A. It was shipped to the Atlantic Mutual Insurance Company.

Q. In the name of the Atlantic Mutual Insurance Company?

A. In the name of the Atlantic Mutual Insurance Company by their agent in Newfoundland.

Q. Has the Atlantic Mutual Insurance Company an office, had it a person to receive in its name in Montreal?

A. No; they sent a special representative to Montreal to await the arrival of the ship and deal with the sugar, Mr. Darragh.

Q. Did you ever see the bills of lading?

A. I must have seen them I dare say, but probably in the hands of Mr. Darragh; but I can't say for certain.

Q. For what length of time was Mr. Darragh in Montreal?

A. Oh, I should think probably a number of days; I couldn't say; I have known him to stay in Montreal for a fortnight about such matters, but how many days he was here about this particular matter I do not know.

Q. Are you sure that that sugar was not shipped to you, or to your company?

A. Quite sure.

Q. Or any part of it?

A. Or any part of it.

Q. You said that the party dealing with the owners of the *Sayre* with respect to the cargo was the Atlantic Mutual Insurance Company?

A. Yes.

Q. This you know from hearsay I suppose?

A. I know it from the communications of the Atlantic and the fact that we had nothing to do with it in any shape or form.

Q. Your company gave no directions whatever as to any dealing with the cargo after the wreck?

A. None whatever.

Q. I don't quite understand what you said about certain additions made to the price, which entered into and formed a part of the general purchase price.

Mr. Mynderse states that the value of the pound sterling was so fixed in insurancing for the purpose of covering bankers' commissions, interest, insurance premiums, etc.

31 Q. Is that the usual method of dealing with purchases of this kind?

A. It is the usual method of dealing with insurance bases on the pound sterling.

Redirect examination by Mr. MYNDERSE:

Q. What became of the policy of insurance that was issued to you by the Atlantic Mutual on this cargo?

A. As soon as they settled it was surrendered to them, as usual.

Q. Is this certificate of insurance the only document that you received from the Insurance Company of North America?

A. I think that is the only document we received; yes, sir.

(Signed) GEO. A. DRUMMOND.

32 United States District Court, Southern District of New York.

CANADA SUGAR REFINING COMPANY, Libellant,
vs.
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent.

Deposition of Alphonso T. Rouse, a witness produced, sworn, and examined pursuant to notice, on behalf of the libellant, before Charles Flynn, notary public, at the office of Butler, Stillman & Hubbard, 54 Wall street, New York, on the 15th day of October, 1895.

Present: Messrs. Butler, Stillman & Hubbard (Mr. Mynderse), for the libellant.
Messrs. Hand & Bonney (Mr. Bonney), for the respondent.

ALPHONSO T. ROUSE, being duly sworn and examined as a witness for the libellant, testifies as follows:

By Mr. MYNDERSE:

Q. What is your full name?
A. Alphonso Troop Rouse.
Q. What is your age?
A. Forty.
Q. Where is your present home?
A. Bia Blancha, South America; I represent a steamship company there.
Q. When do you propose returning there?
A. On about the 20th of October.
Q. Do you know the barque *John E. Sayre?*
A. Yes, I was captain of her for ten years and owned a piece of her; captain and part owner of her.

33 Q. Where did she hail from?
A. St. John, New Brunswick.
Q. Who was the managing owner?
A. F. E. Sayre, St. John.
Q. Were you master of the *John E. Sayre* in the year 1893?
A. Yes, sir.
Q. Do you remember taking a cargo of sugar on her at Iloilo?
A. Yes, sir.
Q. When did you load that cargo?
A. I think it was in January and a portion of February; we sailed from there on the 10th of February.
Q. (Handing witness paper.) Are these the bills of lading for the cargo?
A. Yes, sir; that is my signature.

The bills of lading are offered in evidence and marked respectively, Exhibits A, B, and C of this date.

Q. About what was the weight of the cargo?
A. Well, as near as I can remember now, I think it was 2,460 tons; 2,460 or 2,465 tons.

Q. And that was to be carried where?

A. To Montreal.

Q. And freight was to be paid according to the terms of the bills of lading?

A. According to the terms of the bills of lading.

Q. What became of the *John E. Sayre* on that voyage?

A. Well, somewhere, I think it was in July, we went ashore on the south coast of Newfoundland in a little place called Channel, one mile east of Channel.

Q. What was the condition of the weather at that time?

A. It had been blowing very heavy for three or four days; but there wasn't very much wind when she went ashore; it had been thick fog for about four weeks; very thick when she went ashore.

Q. What kind of a place was it that she went ashore; what kind of a coast?

A. Terrible reefs and rocks; it was dotted with reefs; take a boat you would have to go in and out, in and out, to get her away clear of the reefs.

Q. Did she go ashore fast, or how?

A. No, we was going slow; had some of our sails pulled out, waiting to see if we couldn't get the sun.

34 Q. I mean, was she fast ashore?

A. Oh, yes, she went right up between those two reefs and struck there; she went up at high tide.

Q. What became of her?

A. Well, I was on shore about two hours before I knew where I was; when it cleared up a little bit the fishing-boats came off and told me I was close to Channel in a very dangerous place.

Q. Did you make any efforts to save the vessel?

A. Yes.

Q. Were you able to save her?

A. The fishermen advised us to leave her at once; but I arranged with the crew to stay by till the weather got worse, and try to save what we could; in fact I ran lines and kedge anchors and one thing another, you know; we tried to get her off the reef. I sent a boat out with the mate and one hand, with the lead line, and sounded around for deep water. We got everything in readiness to try to ger her off when the tide rose agaain.

Q. Were you able to relieve her when the tide rose?

A. We broke the hatches out, you know. I thought she was sitting on the middle of the reef, and if I broke out the after end of her and tipped the cargo over she might come off; we worked at the hatches and pumps till she filled right up.

Q. What effect did the filling have on the cargo?

A. Of course it damaged the cargo when we started to fill.

Q. What was done with the cargo in the way of saving it?

A. We landed all we could. I made arrangements with the salvors to save all we could, and they was to get half of what they saved.

Q. Who were these salvors?

A. Fishermen around shore.

Q. And they saved whatever cargo was taken out?

A. Yes, it was saved by the salvors; it was more or less damaged of course.

Q. What agreement did you make for their compensation?

Objected to as immaterial, irrelevant and incompetent.

A. They was to have half.

35 Q. Do you consider that that was a reasonable arrangement?

Objected to on the same grounds as before, and further that the competency of the captain to testify as to the reasonableness of the compensation has not been shown.

A. I consider it a reasonable compensation for this reason; that the vessel was filling fast and the longer the cargo remained on board the sooner it would be destroyed, and they could save all they liked, because if they didn't save it at once it would be melted.

Q. What danger was there in rendering the salvage services?

A. Oh, there was considerable; a heavy surf around all the time; they had to do it with small boats, and anchored their schooners nearly a mile from the vessel.

Q. Were your crew able to remain on the vessel?

A. No, they were frightened and I had to send them ashore.

Q. How far was your vessel from shore?

A. About a mile to the east of Channel. Part of the time there was nobody on board of the ship but myself and the fishermen, some sixty or seventy fishermen; the crew wouldn't stay.

Q. Because of the danger?

A. They were frightened; the sea was washing all over the vessel. I might say a stewardess also stayed; she was the only man among the crew.

Q. About how much cargo was taken out by the salvors?

A. As near as I can judge, about 300 tons more or less.

Q. You never weighed it?

A. No, no, I never weighed it.

Q. This is just a judgment you formed as it went out?

A. Yes, sir, I averaged so many bags to a ton; but a great many of them bags wasn't over half full; some of them were washed out and spilt.

Q. Your best judgment is it was somewhere in the vicinity of 300 tons?

A. Yes.

36 Q. Did you have anything to do with the cargo after it went ashore?

A. Yes, I made arrangements for storing it; landing it out of the schooners and storing it.

Q. Then what became of it?

A. The Atlantic Insurance Company sent their representative around there and took charge of it.

Any testimony as to the Atlantic Insurance Company is objected to as immaterial and irrelevant, and any testimony hereafter taken

respecting any agreement as to salvage compensation and service, or connection of the Atlantic Insurance Company, is taken subject to objection, on the same ground as above stated.

Q. Do you recall the name of the representative of the Atlantic Insurance Company?

A. I think it was Pike; a Mr. Pike.

Q. Did he come from St. John, Newfoundland?

A. He came from St. John, Newfoundland, and he reimbursed me.

Q. Had you incurred some expenses?

A. Yes.

Q. In about what amount?

A. In the vicinity of $300.

Q. To what extent did Mr. Pike reimburse you?

A. He gave me $200 in cash.

Q. What became of the sugar?

A. It was left in his charge.

Q. Who adjusted accounts with the salvors?

A. I think Mr. Sayre—no, I don't know that.

Q. With the salvors of the sugar in Newfoundland I mean.

A. I don't know that, because Mr. Pike took charge of the cargo, and of course I paid two or three hundred dollars expenses on landing and storing it, which he paid me back, or two hundred of it he paid me back; well, that was all I knew, about the cargo; I was done with it then.

Q. You left it then in his hands?

A. I left it then in his hands.

Q. Who attended to forwarding it to Montreal?

A. I couldn't tell you that.

Q. Do you know how it went to Montreal?

A. I think it went on the steamer *Tiber*.

37 Q. But do you know on what terms it was redeemed from the salvors?

A. Well, I suppose it was on my agreement; I agreed for one-half.

Q. Do you know who paid the storage expenses and matters of that kind?.

A. Mr. Pike of course.

Q. Do you know whether he settled with the salvors?

A. Yes, he settled with the salvors, and I did hear that——

Objected to.

(The witness continues:) I did hear that the salvors kept a portion of the sugar for their services.

Q. You did hear that they were paid part in cash and part in sugar?

A. I did hear that they were paid part in cash and part in sugar.

Counsel for respondent objects to the answer as mere hearsay, and incompetent, and moves that it be stricken out.

The WITNESS: I know that to be a fact.

Q. You say those arrangements were made by Mr. Pike?
A. Yes.
Q. Did you have anything to do with the redeeming of the cargo from the salvors, or with the forwarding it?
A. No.
Q. You left that entirely in the hands of Mr. Pike?
A. Yes.
Q. You can't say what amount of expenses and disbursements he paid in settling with the salvors, or in forwarding the cargo?
A. No, no.
Q. How about the freight of the *John E. Sayre* on these 300 odd tons that were saved; how was that adjusted, and with whom; did you have anything to do with that?
A. No, I had nothing to do with that whatever.
Q. Do you know between whom it was adjusted?
A. Between Mr. Sayre and the Atlantic Insurance Company, I think.
Q. Between Mr. Sayre, who was the managing owner of the vessel, and the Atlantic Mutual Insurance Company?
A. Yes.
38 Q. The *John E. Sayre* herself became a total loss on the rocks there?
A. Yes, she was sold for $170.

Cross examination by Mr. BOSSEY:

Q. When did you cease to have to do with the cargo, Captain?
A. Well, when I was paid this $200 on account, and instructed to give the cargo up by my owner.
Q. That was about when?
A. Well, I couldn't tell you the date; it was one or two days, or perhaps three days after the ship was stranded, but the date I don't just remember.
Q. So that what you have testified to as to arrangements made for salvage services and salvage compensation, and arrangements made by Mr. Pike, are what you have heard by report, and not from your own knowledge?
A. Well, the arrangements——
Q. Can't you answer that?
A. I made the arrangement with the salvors myself; Mr. Pike settled it.
Q. Well, what you have testified to as having been done by Mr. Pike is what you have heard from him, and not what you know of your own knowledge?
A. What I have heard; yes.
Q. And not of your own knowledge?
A. No, not of my own knowledge; but my arrangement was made in regard to the salvage and the storage before Mr. Pike came there, and the cargo was held for instructions, or subject to instructions.
Q. When did you leave the vessel?

A. I left her when the last of the sugar had been saved; when the last of the cargo was out.

Q. I think you have stated that the occasion of the accident to the *Sayre* was dense fog?

A. The dense fog.

Redirect examination by Mr. MYNDERSE:

Q. The $200 which you referred to in your cross-examination was paid by Mr. Pike?

A. Paid by Mr. Pike.

Q. And you say you had instructions from your owner; those were instructions to turn the cargo over to Mr. Pike?

39

A. Yes; I was going to forward the cargo myself to Montreal.

Q. And then you left the entire adjustment of matters with Mr. Pike?

A. With Mr. Pike; yes, sir.

Q. He came from St. John's, Newfoundland?

A. From St. John's, Newfoundland.

Q. From the office of Harvey & Company?

A. Yes, sir.

Q. They are the agents in Newfoundland of the Atlantic Insurance Company?

A. Yes, sir.

Q. You have spoken of the circumstances of your going ashore; are those circumstances truly set forth in your protest?

A. Yes, sir.

Q. (Handing witness paper.) Is this a copy of the protest?

A. Yes, sir; that is a copy of the protest.

The paper is offered in evidence and marked Exhibit D of this date.

Recross-examination by Mr. BONNEY:

Q. What was this $200 paid you for?

A. On account of disbursements.

Q. Who do you say was acting as agent for the Atlantic?

A. This Mr. Pike was sent there by Harvey & Company, of St. John's, Newfoundland; st-amship agents.

Q. How do you know that they were acting as agents for the Atlantic Company?

A. Well, we have letters and telegrams; he brought a letter from Mr. Harvey that he was their representative; well, then when I wouldn't take any notice of him there was telegrams from New York here, instructing me to give the cargo up.

Q. Telegrams from whom?

A. From the Atlantic Company.

Q. To you?

A. Yes, sir; I was holding the cargo, intending to send it to Montreal, and then later there was a telegram——

Q. Have you those telegrams?

A. No, sir; I might possibly find them by hunting around. I think I cleared out all my old papers.

District Court of the United States, Southern District of New York.

CANADA SUGAR REFINING COMPANY, Libellant,
against
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent.

Interrogatories Propounded to Augustus W. Harvey, Pursuant to a Commission Issued Herein.

First interrogatory. What is your name, age, residence and occupation?

A. My name is Augustus W. Harvey. I am fifty-six (56) years old. I reside in St. John's, Newfoundland, and am a merchant. I am a partner in the firm of Harvey and Company.

Second interrogatory. What was your occupation or business connection in July and August, 1893? If you were a member of any firm or copartnership, state the name of such firm and what its business was.

A. My occupation in July and August, 1893, was that of a merchant; I was a partner in the firm of Harvey & Co. We carry on the business of commission and general merchants.

Third interrogatory. Did you have anything to do with the cargo of the *John E. Sayre* in July and August, 1893? If yea, state whether the same was pursuant to any instructions and if in writing produce said instructions and state from whom they came and upon what date, and if not in writing, or if you are unable to produce any written instructions, state what such instructions were and from whom and at or about what date they were given to you.

41 A. In July and August, 1893, I had something to do with the cargo of the *John E. Sayre*. My connection with the cargo of the *John E. Sayre* was through instructions from the Atlantic Mutual Insurance Company of New York. These instructions were by telegraph. The first communication which I received from the Atlantic Mutual Insurance Company was a telegram dated and received July 7th, 1893, which I now produce and put in evidence. (Marked A. W. H., 1.) I replied to this telegram. I have not the original reply in my possession. I produce and put in evidence a copy of my reply. (Marked A. W. H., 2.) On July 8th, 1893, I received another message from the same company, which I now produce and put in evidence. (Marked A. W. H., 3.) I replied to this by a telegram, a copy of which I now produce and put in evidence. (Marked A. W. H., 4.) On July 10th, 1893, I received a message from the same company, which I now produce and put in evidence. (Marked A. W. H., 5.) To this I replied by a telegram on July 12th, 1893, a copy of which I now produce and put in evidence. (Marked A. W. H., 6.) On the 12th July, 1893, I also re-

ceived a message in reply to mine of the same date, which I produce and put in evidence. (Marked A. W. H., 7.) On July 13th, 1893, I received a telegram from the same company, which I produce and put in evidence. (Marked A. W. H., 8.) On July 26th, 1893, I sent a message to the same company, a copy of which I produce and put in evidence. (Marked A. W. H., 9.) To this I received a reply on the same date, which I produce and put in evidence. (Marked A. W. H., 10.) On July 31st, 1893, I sent a message, a copy of which I produce and put in evidence. (Marked A. W. H., 11.) To this the company replied on the same date by a telegram, which I produce and put in evidence. (Marked A. W. H., 12.) On August 11th, 1893, I sent to the same company a telegram, a copy of which I produce and put in evidence. (Marked A. W. H., 13) On the same date I received from the same company a telegram in reply, which I produce and put in evidence. (Marked A. W. H., 14.) This is the only correspondence between Harvey & Co. and the Atlantic Mutual Insurance Company on the subject of the cargo of
42 the *John E. Sayre*, except some letters which are merely formal confirmations of the telegrams. I produce the copies of the telegrams which I sent to the Atlantic Mutual Insurance Company. I have not the originals now. I have made enquiries for the originals at the office of the Anglo-American Telegraph Company, and after search I find that they have been destroyed. The Anglo-American Telegraph Company does not keep such messages after six months. The copies which I produce and attach to my deposition are correct copies of the original messages as sent by me to the Atlantic Mutual Insurance Company.

Fourth interrogatory. What did you do with respect to the said cargo? Did you see any of it removed from the *John E. Sayre*, and if yea, upon what dates? What was done with said cargo?

A. We appointed—Harvey & Co. appointed—Captain Robert G. Pike as our representative at Channel, Port-au-Basque, Newfoundland, the scene of the wreck of the *John E. Sayre*. He was an employee of ours. I did not see any of the cargo removed from the wreck. The saved cargo was stored at Channel, Port-au-Basque, and was shipped from thence to Montreal.

Fifth interrogatory. What was the quantity of such cargo and what was its condition? Can you state under what agreement or agreements of salvage said cargo was taken from the vessel, and if yea, state what the same were.

A. I do not know what was the quantity of the whole cargo, or what was its exact condition. I do not know of my own knowledge under what agreement for salvage the cargo was taken from the vessel. I only know these things from the report of Captain Pike.

Sixth interrogatory. Did you have to do in any way with the adjustment of salvage? If yea, state with whom you dealt in making such adjustment and give the names of the salvors. What was the number of sacks and the gross weight thereof saved by each salvor, and what was the net weight? If you have any schedule or
43 accounts setting forth these facts, please produce them and state whether they are correct and annex them to your depo-

sition. State whether these are the original accounts, and if yea state to whom the same were rendered and when they were rendered. Whence do they now come?

A. We had to do with the adjustment of the salvage by and through Captain Robert G. Pike, the person sent by us to act as our representative at the place of the wreck, as before mentioned. I do not know the names of the salvors, except as furnished to our firm by Captain Pike. I produce and put in evidence an account or schedule of the salvage. (Marked A. W. H., 15.) This is the account from Harvey & Co., to the Atlantic Mutual Insurance Company of New York and was transmitted by us to them after the saved part of the cargo had been shipped to Montreal. It is the document signed by Harvey & Co., and dated at St. John's, August 17th, 1893. This Exhibit "A. W. H., 15" headed "Sheet No. 1," is an account of the sugar saved, salvors getting one-half. This is a correct account and is the account rendered to the Atlantic Mutual Insurance Company of New York by Harvey & Co., on August 17th, 1893. Since its transmission I have not seen it until produced by Mr. Emerson, Q. C., counsel for the libellant, on this commission. I also produce and put in evidence an account of the sugar saved from the *John E. Sayre* on a salvage of one cent per pound. (Marked A. W. H., 16.) This Exhibit, "A. W. H., 16," headed "Sheet No. 2," is the account rendered by Harvey & Co., to the Atlantic Mutual Insurance Company of New York, in August, 1893. I have not seen it since its transmission until produced on this commission by counsel for libellant. It is the account sent by us and is correct.

Seventh interrogatory. State in what way the adjustment with the salvors was made. If you say that you purchased from the salvors any portion or share of the said sugar, state what portion or share you so purchased and the amount thereof and the price paid therefor, and state whether the said facts correctly appear in
44 the said accounts produced by you. If salvage in respect to any of the cargo was settled upon a different basis, state upon what portion of the cargo such adjustment was made and the basis thereof, and give the names of the salvors, the weight of the cargo so affected and the sums paid by you? Do the same correctly appear in any of the accounts already produced by you, and if yea, state upon which account?

A. For a portion of the salvaged cargo, the salvors were given one-half of the sugar saved. Another portion was saved upon an agreement for one cent per pound. We purchased the salvors' share of one-half from the salvors at the prices set out in Exhibit A. W. H. 15, and stated in the column "price per lb." These were the various prices paid to the salvors for their share of the salvaged cargo. It was paid for according to its condition, at prices varying from two and a half cents per pound to one-half cent per pound. The facts of the amounts purchased by us for the underwriters, and the prices paid therefor, all appear in the account produced and already in evidence, A. W. H. 15. The only other basis of salvage was under the agreement for one cent per pound to certain salvors, whose names appear in the account already in evidence, Exhibit

A. W. H. 16. The names of the salvors and the weights of the cargo thus saved appear in the said account A. W. H., 16. This account correctly shows the whole transaction of the salved portion of the sugar for which one cent per pound salvage was paid to the salvors.

Eighth interrogatory. State whether you incurred any expense other than the amounts paid by you to the salvors, for storage, weighing or reconditioning said cargo or for reshipping it, or otherwise? If yea, state what was the occasion for such expenses, and the amount thereof? Have you any account thereof? If yea, produce the same and state whether it is a true account and to whom rendered and upon what date?

A. We had to incur expenses for the storage, weighing, reconditioning and reshipping of the salved sugar, for telegrams, for Captain Pike's board and lodging at Channel, and for certain barrows and scales employed. We also paid Cap-
45 tain Rouse for his expenses at Channel. I produce an account (marked A. W. H. 16*a*) which is an account furnished by us to the Atlantic Mutual Insurance Company of New York, of the amount paid to the salvors, as in the statements already put in evidence and marked A. W. H. 15, and A. W. H. 16, and also of the amounts paid for the storage at Channel, for the weighing expenses, for the use of barrows and scales in connection with the landing and weighing of the sugar, for labor in shipping the sugar by the S. S. *Tiber* to Montreal, an amount paid to Captain Rouse of two hundred dollars ($200), an amount paid the magistrate at Channel for attesting certain bills, and amounts paid for two hundred sacks for reconditioning the sugar, for sundry cablegrams, and for the commission of Harvey & Company, on the estimated value of the cargo recovered from the *John E. Sayre*—the whole account amounting to ten thousand and sixty-six dollars and ninety-seven cents ($10,066.97). For this amount we drew on the Atlantic Mutual Insurance Company by a three days' sight draft, adding thereto the bank charges, which made ten thousand one hundred and sixty-seven dollars and sixty-four cents ($10,167.64). This account A. W. H. 16 (*a*) is a correct account of all the disbursements made by us on account of the cargo shipped.

Ninth interrogatory. State whether the charges in said account are, in your opinion, reasonable and customary, and state whether the said account has been paid, and if yea, by whom and upon what date.

A. The charges in the accounts sent by us to the Atlantic Mutual Insurance Company of New York are reasonable and customary, and the said accounts were paid by the Atlantic Mutual Insurance Company in 1893.

Tenth interrogatory. What became of the said sugar? If you say the same was forwarded to Montreal, state the circumstances under which it was forwarded and when and by what means of transportation the said sugars were so forwarded and by whom. Were bills of lading issued therefor? If yea, state by whom
46 the same were issued and to whom, and what became of them. Can you now produce the said bills of lading, or any

of them? If yea, please do so and have them annexed to your deposition. From whom have you received such bills of lading?

A. The saved sugar was shipped from Channel, Port-au-Basque, Newfoundland, on board the S. S. *Tiber* to Montreal. It was shipped by Captain R. G. Pike, our representative before mentioned. Bills of lading for the sugar were issued by Captain De Lisle of the S. S. *Tiber*. The bills of lading I now produce and put in evidence. (Marked A. W. H., 17; A. W. H., 18; A. W. H., 19.) These are the original bills of lading. These bills of lading have been put into my hands by Mr. Emerson, Q. C., counsel for libellant, and I recognize them as the original bills of lading of the sugar saved from the *John E. Sayre*, and shipped to Montreal by the S. S. *Tiber*, for and on account of the Atlantic Mutual Insurance Company of New York on the dates of these bills of lading, by our representative at Channel, Captain Robert G. Pike. The instructions which I gave Mr. Pike were all carried out. Some of these were direct to Pike, and others were through Captain Delaney, of the S. S. *Grand Lake*. Both Pike and Delaney were in the employ of the Coastal Steamship Company, of which we are the proprietors. Nothing was done by Captain Pike unless by our instructions, and everything he did was under our instructions and authority.

Eleventh interrogatory. Do you know of any other matter or thing material to the issues of this action and of advantage to the libellant? If yea, state the same as fully and particularly as though specially interrogated in relation thereto.

A. My other partners are Joseph Outerbridge and John Hoovey. They know nothing more about this matter than I do. I was the partner having the special management of this particular business of the *John E. Sayre*. My partners could not give any more information on the matter than I have given.

47 First cross interrogatory. If in answer to the direct interrogatories you state that you had anything to do with the cargo of the *John E. Sayre* in July and August, 1893, please state whether or not you were an owner or agent of the said vessel. And if not such an owner or agent, please state who then were the owners or agents and their residences and whether or not you communicated with them prior to action on your part respecting such cargo?

A. I was not an owner or an agent of the vessel *John E. Sayre*. I do not know who the owners were, and had no communication with them either directly or indirectly, either before or after our action on behalf of the Atlantic Mutual Insurance Company of New York.

Second cross-interrogatory. If in answer to the direct interrogatories you state that you did anything with respect to the cargo of the *John E. Sayre*, please state whether your action was by authority or with concurrence of the owners or agents of the vessel and give the particulars of this authorization or concurrence, and, if in writing, annex copies of the same?

A. My action in connection with the cargo of the *John E. Sayre*, was with the authority and concurrence of the Atlantic Mutual In-

surance Company of New York and not under any authority form the owners or agents of the vessel.

Third cross-interrogatory. If in answer to the direct interrogatories you state that agreements for or respecting salvage of the cargo were made, please state between whom the same were made and whether or not by authority or with the concurrence of the master or owners of the vessel and give the particulars of such authorization and whether or not the same were in writing. If the same were in writing, please annex copies thereof, and if not in writing, please state whether or not made in your presence and by and between whom?

A. I was informed that the captain of the *John E. Sayre* had made the arrangements for the salvage acting on behalf of all concerned; but we adopted his agreements afterwards on behalf of the Atlantic Mutual Insurance Company, and paid the salvors on behalf
48 of the said company, according to the agreements made by the captain of the *John E. Sayre*. I do not know if the agreements were in writing or verbal.

Fourth cross-interrogatory. If in answer to the direct interrogatories you state that you participated in the settlement with salvors, state who, if any one else, participated therein and whether such settlement was wholly or in part in writing, and, if in writing, please annex to your answers such writing or a copy thereof. And if you state that you purchased from salvors any portion or share of the saved sugar, state whether or not such so-called purchase was part of the settlement and was anything else or more than payment of their salvage claims in money instead of in share or part of the sugar?

A. After Captain Robert G. Pike took charge of the cargo under our instructions, as before stated no one participated in the settlement with the salvors except ourselves, through our representative Captain Pike. Our purchase from the salvors of their portion was as before stated, and was a purchase of their share, which had been delivered to them.

Fifth cross-interrogatory. If in answer to the direct interrogatories you state that the sugar saved from the *John E. Sayre* was in whole or in part forwarded to Montreal, state to whom at Montreal the same was thus forwarded. And do you know or recollect the quantity of sugar thus forwarded? And if you do not, annex the bills of lading therefor, please state what name appeared therein as shipper and what name as consignee?

A. The sugar from the *John E. Sayre* was forwarded to Montreal, to the order of the Atlantic Mutual Insurance Company of New York, as will appear from the bills of lading (Exhibits "A. W. H., 17," "A. W. H., 18," and "A. W. H., 19"), and the quantities of sugar shipped will appear from the same exhibits. We shipped the sugar to the order of the Atlantic Mutual Insurance Company of New York.

Sixth cross-interrogatory. Between the time of learning of
49 the wreck of the *John E. Sayre* and the forwarding of the cargo saved therefrom to Montreal, had you any communica-

tion with or from the Canada Sugar Refining Company, the libellant in this case? If you received any letters or telegrams from such company or its officers or agents, please annex to your answers such letters or telegrams or copies thereof. If you sent to such company or its officers or agents any letters or telegrams, please annex to your answers copies thereof. If you had interviews with any officer or agent of the company during that period, please state with whom and when and where and what was said at such interviews?

A. I had at no time, either before or after the wreck of the *John E. Sayre*, any communication with the Canada Sugar Refining Company or any of its officers or agents. I sent no letters or telegrams to, and received none from, the Canada Sugar Refining Company or any of their officers or agents, at any time, and at no time had I any interview with any of their officers or agents.

Seventh cross-interrogatory. Between the time of learning of the wreck of the *John E. Sayre* and the forwarding of the cargo saved therefrom to Montreal, did you have any conversation with any officer of the Atlantic Mutual Insurance Company? And if so, when and where did such conversation occur and what was said thereat?

A. Between the time of learning of the wreck of the *John E. Sayre*, and the forwarding of the cargo saved therefrom to Montreal, I had no conversation with any officer of the Atlantic Mutual Insurance Company. My only communications with the company were as before stated.

Eighth cross-interrogatory. Do you know of any other matter or thing material to the issues of this action that may tend to the advantage of the respondent, The Insurance Company of North America? If yea, state the same fully and at large as though particularly interrogated in respect thereto.

A. I do not know of any such matter or thing.

50 District Court of the United States, Southern District of New York.

CANADA SUGAR REFINING COMPANY, Libellant,
against
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent.

Interrogatories Propounded to R. G. Pike, Pursuant to a Commission Issued Herein.

First interrogatory. What is your name, age, residence and occupation?

A. My name is Robert G. Pike. My age is thirty-six (36). I reside in St. John's. My occupation at present is that of purser of the steamer *Grand Lake*. I was formerly a master mariner. I have been purser of the *Grand Lake* for about three years.

Second interrogatory. What was your occupation or business connection in July and August, 1893? If you were a member of

any firm or copartnership, state the name of such firm and what its business was.

A. In July and August, 1893, I was purser on the steamer *Grand Lake*, belonging to the Coastal Steamship Company.

Third interrogatory. Did you have anything to do with the cargo of the *John E. Sayre* in July and August, 1893? If yea, state whether the same was pursuant to any instructions, and if in writing, produce said instructions and state from whom they came and upon what date, and if not in writing, or if you are unable to produce any written instructions, state what such instructions
51 were and from whom and at or about what date they were given to you.

A. I had something to do with the cargo of the *John E. Sayre* in July and August, 1893. I was acting under instructions from Harvey & Company, received at Channel, Port-au-Basque, on board the *Grand Lake*. These instructions were by telegraph from St. John's. I have those written telegraphic instructions now, and I received other instructions from Harvey & Co. through Captain Delaney, the captain of the steamer *Grand Lake*, of which I was purser. I produce the telegrams from Harvey & Co. and attach them to my evidence. (Marked "R. G. P., 1.")

Fourth interrogatory. What did you do with respect to the said cargo? Did you see any of it removed from the *John E. Sayre*, and if yea, upon what dates? What was done with said cargo?

A. When I arrived at Channel, Port-au-Basque, I found some of the sugar in schooners and some in store. All the cargo had been removed from the *John E. Sayre* when I arrived in Channel, Port-au-Basque. I arrived there on Saturday, July 8th, 1893, about 7 p. m.

I had all of the cargo taken out of the schooners and put in the stores. I then weighed it and gave the salvors their share. I then bought the salvors' share, under instructions from Harvey & Co. at the prices named in the accounts. A quantity of bags were sent on from St. John's. I had the whole cargo reconditioned and rebagged where it was necessary, and subsequently had it shipped by the S. S. *Tiber* to Montreal.

Fifth interrogatory. What was the quantity of such cargo and what was its condition? Can you state under what agreement or agreements of salvage said cargo was taken from the vessel, and if yea, state what the same were?

A. The net weight of the cargo saved and shipped was three hundred and thirty-four (334) tons, twelve (12) cwt., two (2) qrs., one (1) lb. It was all shipped in good condition except a small quantity which was wet.
52 The agreements for the salvage were as follows: For a small portion there was paid one cent per pound to the salvors, and for the balance the salvors were paid half they landed, in kind.

Sixth interrogatory. Did you have to do in any way with the adjustment of salvage? If yea, state with whom you dealt in making such adjustment and give the names of the salvors? What was the

number of sacks and the gross weight thereof saved by each salvor, and what was the net weight? If you have any schedule or accounts setting forth these facts, please produce them and state whether they are correct, and annex them to your deposition. State whether these are the original accounts, and if yea, state to whom the same were rendered and when they were rendered. Whence do they now come?

A. I had everything to do with the adjustment of the salvage after I arrived there. The agreements for the salvage were made by the captain of the *John E. Sayre* before I arrived. The captain stated to me what those agreements were. They were as I have stated. After the cargo was weighed on shore, I adjusted the salvage with the salvors, and dealt directly with them.

I produce an account (marked "R. G. P., 2") showing the names of the salvors in the first column, the number of sacks in the second column, the gross weight in the third column, the tare in the fourth column, the net weight in the fifth column, the salvors' shares in the sixth column, the price per pound in the seventh column, the amount of such price in the eighth column, the check number in the ninth column, the weighing expenses in the tenth column, the storage expenses in the eleventh column, and in the twelfth column, remarks. This and the account which I am about to produce in a moment are the original accounts made out by me and furnished afterwards to Messrs. Harvey & Co., the agents for the underwriters. This account, R. G. P., 2, is an account of the sugar that was saved on the halves, the salvors' half of which was afterwards purchased by me at the prices mentioned in the seventh column. I
53 made out these accounts myself and handed copies of them in to Harvey & Co. These are the original accounts, and copies of them were rendered to Harvey & Co. immediately upon my return to St. John's. This account which I now produce has been in my possession ever since, and I now produce it and attach it to my evidence. (Marked "R. G. P., 2.")

I also produce and attach to my deposition (marked R. G. P., 3) the account of the portion of the saved cargo for which the salvors received one cent per pound. In the first column of this account are the names of the salvors, in the second the number of sacks, in the third the gross weight, in the fourth the tare, in the fifth the net weight, in the sixth the price paid the salvors, one cent per pound, in the seventh the amount of this price, in the eighth the check number, in the ninth the weighing expenses, in the tenth the storage expenses, and in the eleventh column remarks. Both these accounts which I have put in are correct. This is the original account. It was made up by me, a copy supplied to Harvey & Co. on behalf of the underwriters, and rendered to them immediately on my return to St. John's in August, 1893. It has been in my possession ever since, and I now produce it and attach it to my evidence. (Marked R. G. P., 3.)

Seventh interrogatory. State in what way the adjustment with the salvors was made? If you say that you purchased from the salvors any portion or share of the said sugar, state what portion or

share you so purchased and the amount thereof and the price paid therefor, and state whether the said facts correctly appear in the said accounts produced by you? If salvage in respect to any of the cargo was settled upon a different basis, state upon what portion of the cargo such adjustment was made and the basis thereof, and give the names of the salvors, the weight of the cargo so affected and the sums paid by you? Do the same correctly appear in any of the accounts already produced by you, and if yea, state upon which account?

54 A. The adjustment for the salvors was made as set forth in the account. I purchased the portion of the salvors who received half, at the rates set forth in column seven of R. G. P., 2, and I paid them the amounts set forth in column eight of the same exhibit. I made this purchase under Harvey & Co.'s instructions. Messrs. Harvey & Co. were acting on behalf of the Atlantic Mutual Insurance Company. The other portion of the cargo which was saved I paid the salvors for at the rate of one cent per pound. The facts in connection with the adjustment of the salvage all appear in the two accounts which I have produced, R. G. P., 2, and R. G. P., 3, and these accounts are correct in every particular.

Eighth interrogatory. State whether you incurred any expense other than the amounts paid by you to the salvors for storage, weighing or reconditioning said cargo or for reshipping it, or otherwise? If yea, state what was the occasion for such expenses and the amount thereof? Have you any account thereof? If yea, produce the same and state whether it is a true account and to whom rendered and upon what date?

A. The expenses incurred by me are all set forth in these accounts, R. G. P., 2, and R. G. P., 3, except the amount paid to Capt. Rouse, viz: $200 paid to him by Harvey & Co. through me; my own board at Channel, $20; an amount paid to the magistrate at Channel for attesting bills, $125; costs of 200 sacks for rebagging sugar, $40, and any cablegrams, all of which items were paid direct by Harvey & Co. except my board and the fees to the magistrate. These items will all appear in the account of Harvey & Co. with the Atlantic Mutual Insurance Co.

The expenses which I incurred on account of storage, wharfage, reconditioning and reshipping the sugar will all appear in the accounts which I have produced, R. G. P., 2, and R. G. P., 3. I rendered copies of all these accounts to Harvey & Co. on my return to St. John's in August, 1893. The accounts are correct.

Ninth interrogatory. State whether the charges in said accounts are in your opinion reasonable and customary, and state
55 whether the said account has been paid, and if yea, by whom and upon what date?

A. All these accounts are reasonable and customary charges and were all paid by me in August, 1893.

Tenth interrogatory. What became of the said sugar? If you say the same was forwarded to Montreal, state the circumstances under which it was forwarded and when and by what means of transportation the said sugars were so forwarded and by whom?

Were bills of lading issued therefor? If yea, state by whom the same were issued and to whom, and what became of them? Can you now produce the said bills of lading or any of them? If yea, please do so and have them annexed to your deposition. From whom have you received such bills of lading?

A. The sugar was shipped by the S. S. *Tiber* and forwarded to Montreal. Bills of lading were issued for the sugar, drawn up by me. (Witness is shown three exhibits attached to the evidence of A. W. Harvey, and marked respectively A. W. H., 18, A. W. H., 19, and saith:) I recognize these three as the bills of lading of the sugar from the *John E. Sayre*, shipped by the S. S. *Tiber* from Channel to Montreal—shipped by Harvey & Co. to Montreal, to the Atlantic Mutual Insurance Co. of New York—signed by the captain of the *Tiber*, John De Lisle. These are the original bills of lading. I have not seen them since. One set was given to Captain De Lisle, one set was sent on to Harvey & Co., and another set (all counterparts) was forwarded to the Atlantic Mutual Insurance Co. of New York. They were all drawn up by me.

Eleventh interrogatory. Do you know of any other matter or thing material to the issues of this action and of advantage to the libellant? If yea, state the same as fully and particularly as though specially interrogated in relation thereto?

A. I was acting under the instructions of Harvey & Co., who were agents for the Atlantic Mutual Insurance Co. of New York.

First cross-interrogatory. If in answer to the direct interrogatories you state that you had anything to do with the cargo of the
56 *John E. Sayre* in July and August, 1893, please state whether or not you were an owner or agent of the said vessel. And if not such an owner or agent, please state who then were the owners or agents and their residences and whether or not you communicated with them prior to action on your part respecting such cargo?

A. I was not an owner or agent of the said vessel, but occupied the position stated in my examination-in-chief. I do not know who the owners were. My instructions were to look after the cargo on behalf of the underwriters.

Second cross-interrogatory. If in answer to the direct interrogatories you state that you did anything with respect to the cargo of the *John E. Sayre*, please state whether your action was by authority or with concurrence of the owners or agents of the vessel and give the particulars of this authorization or concurrence and, if in writing, annex copies of the same?

A. My authority for what I did in connection with the cargo was the instructions of Messrs. Harvey & Co., and everything I did was with their concurrence as agents of the Atlantic Mutual Insurance Co. of New York.

Third cross-interrogatory. If in answer to the direct interrogatories you state that agreements for or respecting salvage of the cargo were made, please state between whom the same were made and whether or not by authority or with the concurrence of the master or owners of the vessel and give the particulars of such

authorization and whether or not the same were in writing. If the same were in writing, please annex copies thereof and if not in writing, please state whether or not made in your presence and by and between whom?

A. The agreement for salvage was made with the captain before I arrived at Channel, Port-au-Basque. It was not in writing, it was verbal. I learned it both from the captain and from the salvors. There was never any question between the captain and the salvors as to the agreement. I only carried out the agreement, it was settled before I arrived.

57 Fourth cross-interrogatory. If in answer to the direct interrogatories you state that you participated in the settlement with salvors, state who, if any one else, participated therein and whether such settlement was wholly or in part in writing, and, if in writing, please annex to your answers such writing or a copy thereof. And if you state that you purchased from salvors any portion or share of the saved sugar, state whether or not such so-called purchase was part of the settlement and was anything else or more than payment of their salvage claims in money instead of in share or part of the sugar.

A. There was no settlement in writing with the salvors, it was all verbal. I weighed the sugar and checked it. The salvors were present during the weighing. I calculated the amount due to them and drew an order on Harvey & Co., for the payment. I purchased the salvors' portion as before stated. It was not a part of the settlement, but a purchase of their part of the said goods. We purchased their share of the sugar.

Fifth cross-interrogatory. If in answer to the direct interrogatories you state that the sugar saved from the *John E. Sayre* was in whole or in part forwarded to Montreal, state to whom at Montreal the same was thus forwarded. And do you know or recollect the quantity of sugar thus forwarded? If you do not annex the bills of lading therefor, please state what name appeared therein as shipper and what name as consignee.

A. The saved sugar of the *John E. Sayre* was forwarded to Montreal, and was shipped as will be seen by the bills of lading, to the Atlantic Mutual Insurance Co., of New York. The quantities of sugar will appear in the same bills of lading, annexed to the deposition of A. W. Harvey. The shippers of the sugar were Harvey & Co., and the consignees were the Atlantic Mutual Insurance Co., of New York, as will appear by the bills of lading, which are correct.

Sixth cross interrogatory. Between the time of learning of the wreck of the *John E. Sayre* and the forwarding of the cargo
58 saved therefrom to Montreal, had you any communication with or from The Canada Sugar Refining Company, the libellant in this case? If you received any letters or telegrams from such company or its officers or agents, please annex to your answers such letters or telegrams or copies thereof. If you sent to such company or its officers or agents any letters or telegrams, please annex to your answers copies thereof. If you had interviews with any officer or agent of the company during that period, please state

with whom and when and where and what was said at such interviews.

A. I never at any time had any communication with the Canada Sugar Refining Co., and never heard of them in connection with the matter. My instructions were from Harvey & Co., to act for the underwriters. I got no letters from, nor sent any to, the Canada Sugar Refining Co., or their officers or agents, nor had any interview with their officers or agents at any time.

Seventh cross-interrogatory. Between the time of learning of the wreck of the *John E. Sayre* and the forwarding of the cargo saved therefrom to Montreal, did you have any conversation with any officer of the Atlantic Mutual Insurance Company? And if so, when and where did such conversation occur and what was said thereat?

A. I had no communication with any officer of the Atlantic Mutual Insurance Co., of New York, except with Harvey & Co., who, I understood, were the agents of the Atlantic Mutual Insurance Company of New York.

Eighth cross-interrogatory. Do you know of any other matter or thing material to the issues of this action that may tend to the advantage of the respondent, The Insurance Company of North America? If yea, state the same fully and at large as though particularly interrogated in respect thereto.

A. The place where the cargo was shipped was called Channel. That is the town, and the harbor is called Port-au-Basque.

59 LBT.'s EX. 1. Nov. 9, '96.

British ship *John E. Sayre*, Rouse,

Montreal,

the concerned.

Messrs. The Canada Sugar Refining Co., Ltd.
Messrs. The Bank of Montreal.

Iloilo superior sugar.

I.	3,850 mats, wg. net	1,841.73 piculs.	
II.	3,900 " " "	2,015.43 "	
III.	35,750 " " "	18,759.92 "	
	43,500 mats, wg. net.....	22,617.08 piculs.	
Or 1,413$^{562.5}$ tons at £10:10/ p'r ton cost & freight		£14,842	9 2
Less freight at $7 1/4 p'r ton=$10,248.36 U. S. gold coin at exchange of $4.85 p'r £.....		2,113	1 3
		£12,729	7 11

E. & O. E.

Manila, 26th January, 1892.

60 LBT.'s EX. 2. Nov. 9, '96.

British ship *John E. Sayre*, Rouse,

Montreal,

the concerned.

Messrs. The Bank of Montreal.

Iloilo superior sugar.

A	1,681 mats, wg. net.....	1,000	piculs.
B	3,374 " " "	2,000	"
C	8,569 " " "	5,000	"
	13,624 mats, wg. net.....	8,000	piculs.

Or 500 tons at £10.10/ per ton cost and freight..... £5,250
Less freight at $7¼ per ton = $3,625 at exchange of
$4.85 per £..... 747 8 5

£4,502 11 7

E. & O. E.

Manila, 11th February, 1893.

61 LBT.'s EX. 3. Nov. 9, '96.

Invoice of produce shipped by Ker & Co. on board the British ship *John E. Sayre*, Rouse, master, bound for Montreal, for account and risk of the concerned by order of Messrs. The Canada Sugar Ref'g Co., Ltd., and consigned to Messrs. The Bank of Montreal.

Ilcilo superior sugar.

I.	4,030 mats, wg. net.....	2,078	27	piculs.
II.	10,340 " " "	5,824	57	"
III.	1,595 " " "	840	08	"
	15,965 mats, wg. net.....	8,742	92	piculs.

Or 546^{4325} tons at £10.10/ p. ton cost & freight... £5,737 10 10
Less freight at $7 1/4 p. ton=$3,961.64 at exchange
of $4.85 p. £..... 816 16 8

£4,920 14 2

E. & O. E.

Manila, 11th February, 1893.

p. pro KER & CO.
JAS. M. BEATTIE.

62 LBT.'s EX. 4. Nov. 9/96.

Marks and numbers.

Insurance Company of North America.

$15,000. Philadelphia. No. 39600.

This is to certify, that on the 29th day of April, 1893, this company insured under policy No. 117,407, made for Robert Hampson, fifteen thousand dollars on profits on cargo sugar against total loss only, valued at sum insured, shipped on board of the Br. ship *John E. Sayre*, at and from Iloilo to Montreal, and the loss, if any, subject to the terms and conditions of the policy, has been made payable to the order of Canada Sugar Ref'g Co., Ltd., on surrender of this certificate.

WM. A. PLATT,
2nd Vice-Pres't.

TRENTLER FRYER, *Secretary.*

Not valid unless countersigned by the company's duly authorized agent at Montreal.

Countersigned at Montreal this 29th day of April, 1893.

ROBERT HAMPSON, *Agent.*

$
@ per cent.
Premium
8

Incorporated 1794.

63 LBT.'s EX. 5. Nov. 9/96.

Office of the Atlantic Mutual Insurance Company.

NEW YORK, *July 7th*, 1893.

Canada Sugar Rfg. Co., Montreal, Canada.

GENTLEMEN: Your telegram of this date has been received advising that the *John E. Sayre* is ashore off the coast of Newfoundland. We had previously received the information and communicated with Messrs. Harvey & Co., of St. Johns, N. F., who, in reply, sent us the following telegram, viz:

"Ordered coastal steamer *Grand Lake*, now due channel, render assistance."

Very respectfully, yours ob't serv't,

A. A. RAVEN,
2d V. Pres't.

LBT.'s Ex. 6. Nov. 9/96.

Office of the Atlantic Mutual Insurance Company.

NEW YORK, *July 10th*, 1893.

The Canada Sugar Refining Co., Montreal, Canada.

GENTLEMEN: Your letter of the 7th inst. is received.

As to the empty bags ex *Wandrahm*, we do not think there will be value enough to warrant the expense of sending them to Montreal. You are at liberty to make whatever disposition of them you see fit.

Regarding the *John E. Sayre*, our latest information is that all the sugar between decks has been saved and we hope to arrange to have it sent to Montreal.

Very respectfully, your ob't serv't,

A. A. RAVEN,
2d V. Pres't.

64 LBT.'s Ex. 6x. Nov. 9/96.

"Copy."

MONTREAL, *14th July*, 1893.

The Atlantic Mutual Insurance Co., New York.

GENTLEMEN: We have within the last day or two been repeatedly asked to offer for sugar by Newfoundland parties.

Today an enquiry was received for our best price for about 200 tons of Iloilo sugar ex *John E. Sayre* from Archibald & Co., North Sydney.

We gave no answer to those persons, but advise you by telegraph that your local agent at North Sydney may protect your interests.

We are your obedient servants,

THE CANADA SUGAR RFG. CO. (LTD.),
(Signed) W. W. WATSON, *Sec'y.*

LBT.'s Ex. 7. Nov. 9/96.

(Telegram.)

FROM NEW YORK, 14 *July*, 1893.

To Redpath, Mtl., Can.:

Have not authorized sale; master of *Sayre* agreed to give salvors one-half sugar. We have directed all forwarded to Montreal, allowing one cent pound salvage.

A. A. RAVEN,
2nd V. Pres't.

65 LBT.'S EX. 8. Nov. 9/96.

Office of the Atlantic Mutual Insurance Company.

NEW YORK, *July* 14, 1893.

Canada Sugar Refining Co., Limited, Montreal, Canada.

GENTLEMEN: We annex copies of telegrams passed between us, this day, regarding sugar *ex John E. Sayre.* The master of the vessel agreed with the salvors to give them one-half the sugar saved as salvage. Our correspondent at St. Johns offered to purchase their half and forward the whole to Montreal.

It is quite likely that the salvors, not satisfied with the offer made to them, are endeavoring to ascertain whether more money cannot be made by selling their share of the sugar in Montreal.

We would state, that the offer to pay them one cent per pound for salvage in lieu of giving them one-half the sugar, was suggested by the master, and acceded to by us.

Very respectfully, your ob't serv't,

A. A. RAVEN,
2d V. Pres't.

(Telegrams.)

Received:

"Sugar, supposed *ex John E. Sayre,* being offered here by brokers representing Newfoundland parties."

Sent:

"Have not authorized sale. Master of *Sayre* agreed to give salvors one-half sugar. We have directed all forwarded to Montreal, allowing one cent pound salvage."

67 EXHIBIT 10.

CITY AND COUNTY OF PHILADELPHIA, } ss:
State of Pennsylvania, }

Henry N. Paul, Jr., having been duly sworn according to law, deposes and says that on August 23d, 1894, at 11 o'clock a. m., he duly served original proofs of loss of insurance upon profits made to the president and directors of the Insurance Company of North America by the Canada Sugar Refining Company, Limited, upon the said insurance company, by handing a document of which the annexed is a true and exact copy, to Charles Platt, president of the corporation, entitled the president and directors of the Insurance Company of North America, which said service was made at the office of the said company, No. 232 Walnut street, Philadelphia.

HENRY N. PAUL, JR.

Sworn and subscribed before me this 23d day of August, A. D. 1894.

[SEAL.] WILLIAM E. TOLAN,
Notary Public.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Consulate general of the United States of America for the province of Quebec, Montreal, Canada.

I, the undersigned, vice-consul general of the United States of America for the province of Quebec, do hereby certify and make known that William McLennan whose signature is signed to the annexed instrument in writing is and was at the signing of the same an acting notary public in and for the province of Quebec, residing at Montreal, commissioned and authorized to act as such, and that full faith and credit are due to his official acts.

68 Given under my hand and seal of this consulate general, at Montreal, this 20th day of August, A. D. 1894.

[SEAL.] P. GORMAN,
Vice-consul General of the United States of America.

Proof of loss of insurance upon the profits made to the president and directors of the Insurance Company of North America by the Canada Sugar Refining Company, Limited.

DOMINION OF CANADA, } ss:
City and District of Montreal, }

Be it known that on this twentieth day of August, 1894, before me, William McLennan, a notary public, legally qualified, duly commissioned and sworn, and residing in the said city of Montreal, and the province and district aforesaid, personally appeared William Wallace Watson who, being duly sworn according to law, deposes and says that the following statement and papers therein referred to contain a particular, just and true statement of loss of the Canada Sugar Refining Company, Limited, to the best of his information and belief.

First. That said Canada Sugar Refining Company, Limited, is a corporation organized and existing under the laws of the Dominion of Canada, and that deponent is and at all the times hereinafter mentioned was the secretary of said Canada Sugar Refining Company, Limited.

Second. That at divers dates between the 21st day of January, 1893, and the 8th day of February, 1893, the said Canada Sugar Refining Company caused to be shipped at Iloilo for its account, by Ker & Company of Iloilo, upon the British ship *John E. Sayre* 73,089 mats of Iloilo sugar weighing net about 39,360 piculs, being about 2,462 tons, to be delivered at Montreal, Canada.

69 The said sugar was shipped in three separate lots, for which bills of lading are hereto annexed marked respectively "A," "B," and "C."

That the net invoice cost or value of said sugar was £22,152/13/8, copies of the invoice therefor being hereto annexed marked respectively "D," "E," and "F."

That said cargo was insured by the said Canada Sugar Refining Company, Limited, in the Atlantic Mutual Insurance Company of New York, at divers dates, December 9, 1892, and in March, 1893, and in April, 1893, to cover from time to time the increased market

value of the said sugar, the market therefor being a rapidly rising market; the total insurance thereon by the said Canada Sugar Refining Company, Limited, with the Atlantic Mutual Insurance Company being finally completed on the 29th day of April, 1893, at $166,145.

Third. That on the 29th day of April, 1893, the value of the said sugar, exclusive of freight, being then about $181,000, and largely in excess of the amount for which it had been purchased by the said Canada Sugar Refining Company, Limited, and largely in excess of the insurance placed thereon by the Canada Sugar Refining Company, Limited, with the Atlantic Mutual Insurance Company ($166,145), the said Canada Sugar Refining Company, Limited, caused its said profits upon the said sugar, being then valued at $15,000, to be insured by the president and directors of the Insurance Company of North America in said valued amount of $15,000 for the voyage from Iloilo to Montreal, under a certificate of insurance issued to said Canada Sugar Refining Company, Limited, of which a copy is hereto annexed marked "G." That said certificate appears to be issued under policy No. 117,407 made by the said Insurance Company of North America in favor of Robert Hampson.

That deponent is informed and believes that said Robert Hampson is the agent of the Insurance Company of North America, and that the said policy is an open policy in his favor under which insurance generally is written by the said Robert Hampson on
70 behalf of the said Insurance Company of North America.

That said policy No. 117,407 is not and never has been in the possession of deponent, but has been and is now, as deponent is informed and believes, in the possession of the Insurance Company of North America, or of Robert Hampson, its agent, for which reason no copy of the said policy can be now produced.

Fourth. Deponent further says, upon information and belief, that the said ship *John E. Sayre*, being then in every way fitted for her contemplated voyage, sailed from Iloilo with said sugar on board on or about the 10th day of February, 1893, bound for Montreal.

That on or about the 4th day of July, 1893, the said ship, being still in good condition, met with heavy fog off the coast of Newfoundland and, in the early morning of July 6th, during the prevalence of said fog, stranded on the coast of Newfoundland, about eleven miles east of Cape Ray, and about one mile east of the entrance to Port-au-Basque harbor, where she subsequently became a total wreck.

A copy of the protest of the master of said ship is hereto annexed marked "H."

Fifth. That on the 7th day of July and immediately upon receiving advices of the distress which had come to the said ship, *John E. Sayre*, said Canada Sugar Refining Company, Limited, informed the underwriters thereof, and the said Atlantic Mutual Insurance Company, either by itself or in conjunction with the said Insurance Company of North America, assumed and undertook to take such possession of said cargo as was possible, and dispatched vessels to

the relief of the *John E. Sayre* and, in conjunction with the master of the said vessel, employed salvors to save cargo, under an agreement by which the said salvors, resident in Newfoundland, were to receive one-half of said cargo, or of the value thereof, as salvage compensation, besides which the said underwriters incurred
71 other expenses in the employment of vessels and agents and surveyors, in addition to the obligations incurred under said agreement with the salvors, resident in Newfoundland, the amount of which expense is unknown to deponent.

That by these efforts a certain amount of said cargo, to wit, about 9,900 mats, weighing about 325 tons, were taken out of the said *John E. Sayre* by small sailing craft, and landed in Newfoundland.

That pursuant to the terms of the said salvage agreement the said salvors resident in Newfoundland became entitled to receive one-half thereof, or of the value thereof, as salvage compensation.

That thereafter, as deponent is informed and believes, the said insurers adjusted the claims and rights of the said salvors, by a cash payment to them, the amount of which is to deponent unknown; and that then the said under-riters brought the said 325 tons of sugar to Montreal, incurring expenses therefor, the amount of which is unknown to deponent, where it was received by the said Canada Sugar Refining Company, Limited, on account of and in part payment for the loss sustained by the said Canada Sugar Refining Company, Limited, credit being given to the insurers therefor, in the amount at which the said sugar was insured.

Sixth. That the value of the said 325 tons of sugar in Montreal was about $20,000.

Seventh. Deponent further says that at the time of the loss aforesaid, the entire shipments of sugar, as aforesaid, upon the said *John E. Sayre* were, with all the profits thereon, for the account of and at the risk of the said Canada Sugar Refining Company, Limited, and that by reason of the premises and matters aforesaid, the said profits were totally lost to deponent; wherefore the Canada Sugar Refining Company, Limited, claims by reason of said loss and damage and insurance the full sum of $15,000, being the amount of loss sustained by it as aforesaid.

72 Eighth. Deponent further says that on the 10th day of January, 1894, it caused to be submitted to the said Insurance Company of North America a statement, of which a copy is hereto annexed, marked "I," to which the said Insurance Company of North America responded with a letter, of which a copy is hereto annexed, marked "J," and that in accordance with the request contained in said letter, deponent caused his attorneys, Messrs. Butler, Stillman & Hubbard, of New York, to confer, on or about the 11th day of January, 1894, with the said Mr. Catlin and with his counsel, to whom they were referred; and that at that time all of the documents, of which copies are hereto annexed, were proffered to the said Insurance Company of North America and its counsel; but the only certain documents, to wit, a copy of the certificate of insurance, now marked "G," and a copy of the protest, now marked "H," were accepted or retained by said insurance company and its counsel,

the statement being then made by them that the other documents were not needed for the consideration of the questions involved.

That no decision was announced by said Insurance Company of North America respecting its liability for the loss claimed by the said Canada Sugar Refining Company, Limited, upon profits, until August 6, 1894, although they were frequently requested to announce their decision in respect to their liability; and that upon said 6th day of August, 1894, they caused a letter, of which a copy is hereto annexed, marked "K," to be addressed to the said Messrs. Butler, Stillman & Hubbard, attorneys for the Canada Sugar Refining Company, Limited; and that on the 16th day of August, 1894, said insurance company for the first time made objection that no proof of interest of the said Canada Sugar Refining Company, Limited, to said profits had been filed, or that such profits were a total loss under the insurance effected by them, as appears by the letter of said Insurance Company of North America, a copy of which is hereto annexed, marked "L," and for the reasons aforesaid,
73 that said Canada Sugar Refining Company, Limited, claims interest upon the said amount of $15,000 from the 11th day of January, 1894.

W. W. WATSON.

Sworn to before me this 20th day of August, 1894.

[SEAL.] WILLIAM McLENNAN, *N. P.*

"A."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre*, whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal.

I.	3,850 mats.	Forty-three thousand five hundred mats Iloilo
II.	3,900 "	superior sugar wg. nett 22,617.08 pcls.
III.	35,750 "	
	43,500 mats.	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7¼) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 21st January, 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE, *Master.*

74 "B."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre*, whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal.

A	1,681 mats.	Thirteen thousand six hundred and twenty-four
B	3,374 "	mats Iloilo superior sugar wg. nett 8,000 piculs.
C	8,569 "	
	13,624 mats	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7\frac{1}{4}$) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 1st February, 1893.

Weight and contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

75 "C."

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre* whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal,

I.	4,030 mats.	Fifteen thousand nine hundred and sixty-five
II.	10,340 "	mats Iloilo superior sugar wg. nett 8,742.92
III.	1,595 "	piculs.
	15,965 mats	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the sea excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7\frac{1}{4}$) seven and a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 8th February, 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

76 "D."

British ship *John E. Sayre*, Rouse,
Montreal.

The concerned,

Messrs. The Canada Sugar Refining Co., Ltd.
Messrs. The Bank of Montreal.

Iloilo superior sugar.

I	3,850 mats, wg. net	1,841.73 piculs.
II	3,900 " " "	2,015.43 "
III	35,750 " " "	18,759.92 "
	43,500 mats, wg. net.....	22,617.08 piculs.

Or 1,413^{5675} tons at £10.10/ per ton cost & freight	£14,842	9	2
Less freight at $7 1/4 p'r ton=$10,248.36 U. S. *gold coin* at exchange of $4.85 p'r £.....	2,113	1	3
	£12,729	7	11

E. & O. E.
Manila, 26th January, 1893.

77 "E."

British ship *John E. Sayre*, Rouse,
Montreal.

The concerned,

Messrs. The Canada Sugar Refining Co., Ltd.
Messrs. The Bank of Montreal.

Iloilo superior sugar.

A	1,681 mats, wg. net.....	1,000 piculs.
B	3,374 " " "	2,000 "
C	8,569 " " "	5,000 "
	13,624 mats, wg. net.....	8,000 piculs.

Or 500 tons at £10:10/ p'r ton cost and freight	£5,250		
Less freight at $7 1/4 per ton = $3,625 at exchange of $4.85 per £.....	747	8	5
	£4,502	11	7

E. & O. E.
Manila, 4th February, 1893.

KER & CO.
JAMES M. BEATTIE.

78 "F."

Copy.

Invoice of produce shipped by Ker & Co. on board the British ship *John E. Sayre*, Rouse, master, bound for Montreal, for account and risk of the concerned, by order of Messrs. The Canada Sugar Ref'g Co., Ltd., and consigned to Messrs. The Bank of Montreal.

Iloilo superior sugar.

I.	4,030 mats, wg. net.....	2,078.27 piculs.	
II.	10,340 " " "	5,824.47 "	
III.	1,595 " " "	840.08 "	
	15,965 mats, wg. net..	8,742.92 piculs.	
Or 546[4325] tons at £10.10/ p. ton cost of freight...		£5,737 10 10	
Less freight at $7 1/4 p. ton=$3,961.64 at exchange of $4.85 p. £.....		816 16 8	
		£4,920 14 2	

E. & O. E.
Manila, 11th February, 1893.

KER & CO.
JAMES M. BEATTIE.

79 "G."

Marks and numbers.

Insurance Company of North America.

$15,000. Philadelphia. No. 39600.

This — to certify, that on the 29th day of April, 1893, this company insured under policy No. 117,407 made for Robert Hampson fifteen thousand and $\frac{00}{100}$ dollars on profits on cargo sugar against total loss only valued at sum insured shipped on board of the Br. ship *John E. Sayre* at and from Iloilo to Montreal and the loss if any, subject to the terms and conditions of the policy, has been made payable to the order of Canada Sugar Ref'g Co., Ltd., on surrender of this certificate.

WM. A. PLATT,
2nd Vice-Pres't.
GRENTLER FRYER, *Secretary.*

Not valid unless countersigned by the company's duly authorized agent at Montreal.
Countersigned at Montreal this 29th day of April, 1893.
ROBERT HAMPSON, *Agent.*

$
at per cent.
Premium
$

Incorporated 1794.

80 "H."

By this public instrument of declaration be it known and made manifest that on this thirteenth day of July in the year of our Lord one thousand eight hundred and ninety-three, before me, Robert T. Squarey, one of Her Majesty's stipendiary justices of the peace, in and for the colony of Newfoundland, a commissioner of the supreme court of Newfoundland and a notary public for the island of Newfoundland, duly authorized and sworn and residing and practising at Channel in the said colony. Personally came and appeared Alfonso T. Rouse, the master and commander of the ship or vessel called the *John E. Sayre*, of the burthen of fifteen hundred and forty-eight tons or thereabouts per register, belonging to the port of Saint John, New Brunswick, in the Dominion of Canada, Edward G. Rouse, chief mate, John McGrath, boatswain, and Alfred Stewart, carpenter, on board of the said vessel, who in pursuance and extension of a protest duly noted with and entered by me, the said notary, on the seventh day of July instant and being duly sworn upon the Holy Evangelists of Almighty God, did by these presents unanimously affirm, testify and say, that on the tenth day of February last past, the said vessel being tight, strong and staunch, well manned, equipped, provided with all things necessary and essential for a vessel of her burthen on her intended voyage and being loaded with a cargo of two thousand four hundred and sixty-two tons of sugar, they, the said appearers, set sail in and with the said vessel from and out of the port of Iloilo in the Philippine islands, bound to the port of Montreal in the Dominion of Canada. That they encountered very severe weather and very heavy gales during the voyage. That on the fourth July instant with ship and ship's company in excellent condition, and while in latitude forty-five degrees and nine minutes north, and longitude fifty-seven degrees
81 and ten minutes west they encountered moderate weather with thick fog. That at 6 o'clock p. m. of the 5th July, with moderate breeze from E. S. E. and ship's course N. by W., was running along with mainsail and cross-jack hauled up and spanker furled, the hands constantly on the lookout and blowing fog-horn and the captain and officer of the watch on the poop, also on the lookout. That at 9 p. m. the same day the captain thought he heard the noise of surf, but as the night was so dark and thick, was not sure. They put the ship's head to the southward at once and sounded, but got no bottom with sixty-one fathoms. At 30 minutes after midnight ship's head still to the southward and going about four miles per hour. At 3 a. m. with very little breeze ship still heading south. At 8 a. m. head ship to the north. Captain and officer of the watch on the poop. That on 6th July commenced with thick fog and light breeze from S. E. ship's head still to the north and the ship lying with maintopsail aback all hands on the lookout and fog-horn constantly going. At 4 a. m. it was dead calm and very foggy and they could hear very distant sound of surf. 8 a. m. wore ship to the north and set the mainsail. At 8.30 a. m. the sun came out, but fog continued thick on the horizon.

At 10 a. m. made breakers on both sides and ahead. Let go all lee braces and hauled all the sails aback, and while the ship was going stern first about two knots an hour they struck on a rock stern first. That they hauled all the yards around again and tried to surge the ship's head, but she did not move. Sounded all around the ship and found four fathoms of water from mizen chains on port side along forward around the bow and aft on starboard side to mizzen chains. They got stream anchor out and carried it off ahead with a six-inch line fast sounding all the way and keeping in five and six fathoms of water, ran the length of the line and let go the anchor. At noon of the 6th, unshackled the starboard chain off bower anchor hauled it aboard and took it off the windlass, took end of
82 stream anchor line in through the starboard hawse pipe around the windlass and hove it tight. Then clewed up all sail, the carpenter employed watching the pumps and at that time he reported four inches of water in well, manned the windlass and hove on the line until it became impossible to get more. All hands then manned the pumps, the tide was then falling. That the vessel seemed to be afloat from mizzen chains forward. That a great many boats from the shore came alongside when these appearers then ascertained that their ship was stranded on the coast of Newfoundland about 11 miles east of Cape Ray and about one mile east of the entrance to Port-au-Basque harbor. That the said master employed forty men, broke open after hatch and commenced passing up cargo and piling it on the deck forward. That the said master then sent on shore for boats or schooners to discharge cargo into. They kept the pumps constantly going and the water was not gaining in the well. The carpenter had strict orders to watch the well and report any change to the said master. That at 8 p. m. the carpenter reported water increasing and an extra number of hands were ordered to the pumps and others employed throwing cargo overboard, the tide then being about low water and ship commencing to pound heavily. The said master engaged a pilot. At about midnight, hove the bow line as tight as possible. Carpenter reporting that the water in the well was increasing very fast. All hands employed at the pumps. After midnight of the sixth and early hours of the seventh hoisted out the boats and the port watch was ordered into them with the mate, for safety the master remaining on board with remainder of the crew, pumps still going. At 5 a. m. of the 7th more fishermen and a number of small boats came alongside and were employed boating cargo on shore. At 7 a. m. five schooners anchored ahead and master called a survey and on their recommendation commenced discharging cargo out of three hatches and conveying it to schooners in boats and continued so em-
83 ployed throughout the day. Saturday 8th it blew a strong breeze from S. E. with heavy undertow and the ship was half full of water, people were employed discharging cargo; at 4 p. m. ship was striking heavily and ship's crew, with other assistance, were employed in slipping and saving all running gear and sails until dark when as ship was striking heavily it was deemed advisable as a matter of safety for those employed to go on shore which

they did leaving ship in charge of a police officer and boat's crew; 9th there was no work on the ship, no inducement would get the people to work, ship was therefore left as before, in charge of police officer and boat's crew.

10th. The sugar that was still dry was landed and as all ship's materials was sent on shore the vessel was left to the charge of a police officer and boat's crew to await final instructions.

Wherefore the said appearers have protested and by these presents do solemnly protest —all and every person and persons whom it doth shall or may in any manner concern for all losses, prejudices and interests, costs, charges, damages and expenses already suffered and sustained or that shall or may be hereafter suffered and sustained by the owners of the said vessel or cargo or others interested in the said vessel or cargo for by reason or on account of the premises aforesaid and which losses, costs, charges, damages and expenses shall or may be recoverable from and against underwriters and others concerned in time and place convenient and as of right appertains such losses and damages having happened and occurred as aforementioned and not having been occasioned by or through the neglect of any of the said vessel's company who and every of whom did their utmost for the preservation of the said vessel.

Thus declared and protested at Channel in my office.

In witness whereof the said appearers have hereunto set their hands and I, the said Robert T. Squarey hereunto subscribing my hand and affixing my seal and Richard H. Parsons and
84 George E. Dicks, both of Channel, aforesaid gentlemen hereunto also subscribing in testimony of the premises.

(S'd) ALPHONSO G. ROUSE.
" EDWARD G. ROUSE.
" JOHN McGRATH.
" ALFRED STEWART.

(S'd) RICHARD PARSONS,
" GEORGE E. DICKS,
Witnesses.

In testimonium veritatis.
[SEAL.]

R. T. SQUAREY,
Her Majesty's Notary.

PROVINCE OF NEW BRUNSWICK, } ss:
City and County of Saint John, }

I, George E. Thomas, notary public in and for the city and county of Saint John, province of New Brunswick, Canada, duly commissioned and sworn, and residing therein, do certify the foregoing to be a correct copy of the original protest in the case of the late ship *John E. Sayre.*

In testimony whereof I have hereunto set my hand and affixed my notarial seal at the city of Saint John aforesaid this second day of September, A. D. 1893.

[SEAL] G. E. THOMAS, *Not. Pub.*

"I."

NEW YORK, *January 9th*, 1894.

The *John E. Sayre.*

Insurance Company of North America.

DEAR SIRS: We are acting for the Canada Sugar Refining Company in the matter of the insurance made by your company for them in the amount of $15,000 upon profits on a cargo of sugar shipped on the *John E. Sayre* at Iloilo for Montreal. The insurance was made in Montreal April 29th, 1893, by certificate
85 No. 39600 issued under policy No. 117,407, made for Robert Hampson. The certificate was countersigned by Robert Hampson, who we understand is your agent in Montreal. By the terms of the insurance the profits were insured against total loss only, and they were valued at the sum insured, to wit: $15,000. The original shipment consisted of about 73,089 mats, or about 2,460 tons, worth as per invoice about £22,000. It was first insured in the Atlantic Mutual Insurance Company December 9th, 1892, on the basis of $6.50 to the pound sterling. This valuation was increased in March and again in April, when the insurance was completed on the 29th at $166,145. On that same day your insurance on the profits was made, the value of the cargo then being about $181,000.

In prosecuting her voyage the *John E. Sayre* went ashore on the coast of Newfoundland July 6th, and became a total loss.

Some of the sugar was taken off by persons acting under the authority of the master and of the Atlantic Mutual Insurance Company, and was subsequently delivered at Montreal, the Atlantic Mutual Insurance Company paying the salvage expenses. The amount so delivered was about 9,900 mats weighing net about 325 tons and worth about £4,000.

The refining company claim a total loss.

We shall be glad to furnish any further information that you may require, or to take the matter up with your New York office for investigation.

Very truly, BUTLER, STILLMAN & HUBBARD.

86 "J."

Founded 1792.

INSURANCE COMPANY OF NORTH AMERICA,
232 WALNUT STREET, PHILADELPHIA, *Jan. 10th*, 1894.

Cable address: Platt, Philadelphia.
All letters and telegrams should be addressed to the company.

Messrs. Butler, Stillman & Hubbard, New York city.

DEAR SIRS: Your letter of the 9th instant is received.

We will be glad if you will confer with Mr. Catlin in New York,

as to the question of liability under our insurance on profits on sugar per ship *John E. Sayre*, from Iloilo to Montreal.

Yours truly,

WM. A. PLATT.
B.

"K."

Clifford A. Hand,
Frederick A. Pell,

George B. Bonney,
Townsend Jones.

Law offices: No. 51 Wall street.

NEW YORK, *August* 16*th*, 1894.

Re the "JOHN E. SAYRE."

GENT.: Touching the claim of the Montreal Sugar Refining Compand against the Insurance Company of North America for the alleged loss of profits upon cargo of sugar, please allow us to
87 state that we have been requested by the latter company to inform you "that after careful consideration they have decided to decline paying the claim."

We remain very respectfully yours,

HAND, BONNEY, PELL & JONES.

To Butler, Stillman & Hubbard, 54 Wall St., New York.

"L."

Founded 1792.

INSURANCE COMPANY OF NORTH AMERICA,
232 WALNUT STREET, PHILADELPHIA, *August* 15, 1894.

Cable address: Platt, Philadelphia.
All letters and telegrams should be addressed to the company.

Messrs. Butler, Stillman & Hubbard, New York, N. Y.

DEAR SIRS: Your letter of the 14th instant is received, and contents have our attention.

"*John E. Sayre.*"

We do not recognize that any sufficient proofs of loss referring to our interest of profits, have been presented to us. So far as the papers are concerned, we are satisfied with the bill of lading, invoices, the copy of the insurance certificate, copy of the protest and the account of the receipts.

No paper of any description has been shown, which would prove the refining company's interest, so far as regards profit, nor
88 has anything been shown which would prove to us, that these profits were a total loss under the insurance effected with us.

Yours truly,

WM. A. PLATT,
B.

EXHIBIT 11.

Copy.

No. 117,407. Gold. No. 2 cargo.

By the president and directors of the Insurance Co. of North America.

This policy of insurance witnesseth, that the president and directors of the Insurance Company of North America, by these presents, do cause Robert Hampson, to be insured in the sum of — lost or not lost, at and from ports and places to ports and places.

It is understood that the assured is to have power to issue certificates for any risk or risks under this policy, making the loss payable either at the office of the company at Philadelphia or at the counting-house of Messrs. Brown, Shipley & Co., London, to the holder thereof, on approval of the several risks by the company.

For account of whom it may concern. Loss, if any, payable to the parties in whose favor the certificates are drawn.

Upon merchandise. Exchange valued at 111½ gold on board of the vessel or vessels and conveyances in connection therewith whereof is master for this present voyage —— —— or whosoever else shall be master of said vessel, or by whatever other name or names the said vessel or masters thereof shall be named or called:

Beginning the adventure upon the said vessel as aforesaid;
89 and upon the freight or property, from and immediately following the loading of said property on board said vessel, and to continue during the voyage aforesaid on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety, and on the freight and property, until the property shall be safely landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance. And in case of any loss or misfortune resulting from any peril insured against, the party insured engages for himself, or themselves, his or their factors, servants and assigns to sue, labor, travel for and use all reasonable and proper means for the security, preservation, relief, and recovery, of the property insured, or any part thereof; to the charges whereof, the said company engages to contribute in proportion as the sum insured bears to the whole sum at risk; and the acts of the insured or assurers, or of their joint or respective agents, in preserving, securing, or saving the property insured in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of abandonment. The company having been paid the consideration for this insurance by the assured, or his or their assigns, at the rate of — per cent., the premiums on risk to be fixed at the time of endorsement; and such clauses to apply as the company may insert as the risks are successively reported.

Touching the adventures and perils which the said insurance company are contented to bear and take upon them; they are, of the seas, fires, pirates, rovers, assailing thieves, jettisons, and also barratry of the master and mariners unless the assured be owner or part owner of the vessel (embezzlement and illicit trade excepted in all cases), and such other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said
90 vessel, freight, or property, or any part thereof, as may be assumed by this policy and expressed therein. Provided, and it is expressly agreed, that the insurers shall not be liable for damage or injury to goods by dampness, change of flavor, or by being spotted, discolored, musty, or mouldy, unless the same be caused by actual contact of sea water with the articles so damaged. And in case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation of the damaged from the undamaged portion of a damaged package or packages respectively and the sale of the damaged portion or portions only and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable. And provided, also, that the said company shall not be liable for any claim for, or loss by, seizure, capture or detention, or the consequences of any attempt thereat.

It is also agreed, that bar, bundle, rod, hoop and sheet iron; wire of all kinds, tin plates, steel, madder, sumac, wickerware, willow, manufactured or otherwise, cheese, salt, grain of all kinds, seeds of all kinds, fruits whether preserved or otherwise, dry fish, vegetables and roots, prepared or otherwise, rags, hempen yarn, bags, cotton bagging and other articles used for cotton bagging, pleasure carriages, household furniture, musical instruments, looking-glasses, skins and hides, and all articles perishable in their own nature, are warranted by the assured free from average (except general), unless it happen by stranding, and amount to twenty per cent. on the whole aggregate value of such articles; hemp, leaf tobacco, tobacco stems, bread, Indian meal, matting and cassia (except in boxes), free from average (unless general), under fifteen per cent. on the whole aggregate value of such articles; coffee in bags or bulk, pepper in bags or bulk, rice, sugar, flax and saltpetre, free from average (unless general) under seven per cent. on the whole aggregate value of such articles.

91 And in case of loss, such loss to be paid in sixty days after proof of loss, proof of interest, and adjustment exhibited to the assurers; the amount of the premium, or the note given for the premium, if unpaid, and all sums due to the company from the assured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the assurers. But no loss or average shall in any case be paid under five per cent. on each passage, unless general.

Provided always, and it is further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance

may be deficient towards fully covering the premises hereby insured, without any deduction for the insolvency of all or any of the underwriters, and shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said premises subsequent in date to the policy, this insurance company shall nevertheless be answerable for the full extent of the sum by them subscribed thereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent assurance had been made.

It is also agreed that the vessel, freight or property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; and also free from any charge, damage, loss or claim on account of injury to any other vessel or her cargo, arising from collision of the vessel herein named with such other vessel.

It is further agreed that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis for ascertaining her value shall be her valuation in this policy, and if not valued herein, then her actual value at the port to which she belonged at the time of the inception of this risk. And it is also agreed that if the above-named vessel, upon a regular survey, shall be declared unseaworthy by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy. And if the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

92

And it is further agreed, that one-third shall be deducted from the cost of all repairs or injuries and losses on the vessel by perils insured against (except on anchors and copper) as a commutation for the average difference between new and old, the remains of all articles replaced being considered as salvage and accordingly deducted from the nett loss. And instead of deducting one-third from the cost of recoppering, there shall be deducted two and a half per cent. of the nett cost of recoppering, after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel at the time when it is taken off, and if the copper shall have been on forty months or more, the cost of recoppering shall be wholly excluded.

It is also agreed, that when the goods insured arrive at this port, no claim for loss of damage shall be allowed, unless the insured, or consignee, give notice to this company of the same, within ten days after the landing, and also of any public sale intended to be made in consequence of such loss or damage, at least two days previous to such sale, and that the company are not liable for loss or damage by breakage, leakage, wet or exposure on goods insured as on deck.

It is also agreed, that no liability is incurred under this policy for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

93 It is further agreed, that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have the liberty to proceed to another port not blockaded, which shall be substituted for the blockaded port.

It is also agreed, that in all cases of return premium for short property or over insurance, ten per cent. of the return premium shall be retained by the insurers.

It is also agreed, that no assignment of this policy shall be valid, unless the premium has been paid or the note given therefor is further secured by a previous endorsement of the person or persons for whose benefit said assignment is intended, and unless the consent of the insurers be first obtained.

The following clauses are printed in red in margin*al* of policy:

It is understood and agreed that this policy shall not be deemed as continued in force for more than one year from the date hereof unless otherwise agreed upon, and endorsed hereon.

It is expressly understood and agreed that the company shall not be liable for any claim for loss by capture, seizure, detention or destruction, or the consequences of any attempt thereat by or arising from the acts of any belligerent nation or people, notwithstanding anything to the contrary in this policy.

Proof of loss to be authenticated by the agent of the company, if there be one, at the place where such proofs are taken.

In witness whereof, the president and directors of the Insurance Company of North America have caused their common seals to be affixed to these presents in Philadelphia, the twenty-sixth day of August, one thousand eight hundred and seventy-three.

(S'g'd) CHARLES PLATT,
Vice-President.

94 Ex. A. Oct. 15/95.

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Syre*, whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal.

I	3,850	mats.	Forty-three thousand five hundred mats Iloilo
II	3,900	"	superior sugar wg. nett 22,617.08 pcls.
III	35,750	"	
	43,000	mats.	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight

for the said goods at the rate of ($7¼) seven & a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 21st January, 1893.

Weight and contents unknown.

All other conditions as per charter-party.

A. T. ROUSE, *Master.*

95 Ex. B. Oct. 15/95.

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre*, whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal

A	1,681 mats.	Thirteen thousand six hundred and twenty-four
B	3,374 "	mats Iloilo superior sugar wg. nett 8,000 piculs.
C	8,569	
	13,624 mats	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7¼) seven & a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Iloilo 1st February, 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

96 Ex. C. Oct. 15/95.

Shipped, in good order and well conditioned, by Ker & Co. in and upon the good Brit. ship called the *John E. Sayre* whereof is master for this present voyage, Rouse, and now lying at anchor in the port of Iloilo and bound for Montreal

I	4,030 mats.	Fifteen thousand nine hundred and sixty-five
II	10,340 "	mats Iloilo superior sugar wg. nett 8,742.92
III	1,595	piculs.
	15,965 mats	

being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned (all dangers and accidents of the seas excepted) at the aforesaid port of Montreal unto

the Bank of Montreal or to their assigns, he or they paying freight for the said goods at the rate of ($7¼) seven & a quarter dollars U. S. gold coin per ton of 20 cwts. nett weight delivered in full.

In witness whereof, the master or purser of the said vessel has affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Iloilo 8th February, 1893.

Weight & contents unknown.

All other conditions as per charter-party.

A. T. ROUSE.

97 (A. W. H. 1.)

The Anglo-American Cable Company.

(Blank.)

Place from, New York. No. words, 12. Jul- 7, 1893.

To Harvey & Co.:

Can assistance be sent to *John E. Sayre* ashore at Channel?

A. A. RAVEN,
2nd V. Pres't.

(A. W. H. 2.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

JULY 8TH, 1893.

Our correspondent Channel reports *Sayre* filled water to second deck. Nearly all cargo on second deck salved by boats. Cargo lower hold spoiled. Little chance getting vessel off. *Grand Lake* momentarily expected. Are you interested hull?

(A. W. H. 3.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 17. Jul- 8, 1893.

To Harvey & Co.:

Have saved cargo protected arrange for salvage and forward to destination have no interest in hull.

A. A. RAVEN,
2nd V. Pres't.

98 (A. W. H. 4.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

JULY 8TH, 1893.

Grand Lake confirms previous report. Have appointed competent agent protect cargo. Captain of *Sayre* arranged give salvors half. Do you desire to purchase salvors' half? If so give limits.

(A. W. H. 5.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 25. Jul- 10, 1893.

To Harvey & Co.:

Are unable to determine value at present arrange with salvors to take sugar at ascertained value when delivered at Montreal giving security if necessary.

A. A. RAVEN,
2nd V. President.

(A. W. H. 6.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

JULY 12TH, 1893.

Salvors offer sell two half cents pound bond. Possibly take quarter cent less. Shall we buy for your account. Salvors unlikely let their share go without fixing price. Reply promptly.

99 (A. W. H. 7.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 21. Jul- 12, 1893.

To Harvey & Co.:

On sound sugar authorize you to pay two and one-fourth cents pound if not acceptable forward our portion only.

A. A. RAVEN,
2nd V. Pres't.

(A. W. H. 8.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 31. Jul- 13, 1893.

To Harvey & Co., St. John's:

Master *Sayre* telegraphs that tramp steamer offers to take sugar to Montreal one fifty ton he can settle salvage cent pound and asks for instructions have referred him to you.

A. A. RAVEN,
2nd V. Pres't.

(A. W. H. 9.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

JULY 26TH, 1893.

Captain *Sayre* refuses let our agent ship sugar until his bill of which he refuses items is paid. We offer pay any legal claim. Will you telegraph captain to deliver us all cargo immediately and give us bill with items which we will pay.

100 (A. W. H. 10.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 8. Jul- 26, 1893.

Have requested owner *Sayre* to instruct captain.

A. A. RAVEN,
2nd V. Pres'd't.

(A. W. H. 11.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

JULY 31ST, 1893.

Are shipping about three hundred and fifty tons *Sayre's* sugar steamship *Tiber* your order Montreal. All insured by you, arrange for delivery Montreal.

(A. W. H. 12.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 9. July 31, 1893.

To Harvey & Co.:

Consign sugar to Canada Sugar Refining Company Limited Montreal.

A. A. RAVEN, *2nd V. P.*

(A. W. H. 13.)

Copy of Telegram Sent by Harvey & Co., St. Johns, N. F., to the Atlantic Mutual Insurance Company, New York.

AUGUST 11TH, 1893.

There are some general average charges against proportion of freight payable *Sayre.*

101 (A. W. H. 14.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, New York. No. words, 19. Aug. 11, 1893.

To Harvey & Co.:

No freight should be paid on sugar until delivery there being salvage against it same as on cargo.

A. A. RAVEN,
2d V. Pres't.

Brig "J. E. Sayre."

Name.	Sacks.	Gross weight. T.	Cwt.	Qrs.	Lbs.	Tare.	Nett weight. T.	Cwt.	Qrs.	Lbs.	Salvor's share. T.	Cwt.	Qrs.	Lbs.	Price per lb.	$ cts.	Weighing expenses.	Stor'ge.	Order No.	
Capt. Solomon Gillam.	1,451	47	9	3	24	1,451	46	17	0	1	23	8	7	00	2½c.	1,311 80	5 44	.....	4	
Capt. Adam Power....	2,098	67	17	0	11	2,098	66	18	1	13	23	17	0	7	2½c.	1,335 77	.....	.....	2 & 3	
Emmanuel Matthews.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	6	0	3	13	1¾c.	236 89	.....	.....	22	
Edward Gillam	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2	12	0	18	1¾c.	102 23	.....	.....	13	
William Hickman. ...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	19	0	9	1¾c.	37 40	7 86	.....	5	
Capt. John Eastman...	1,099	37	6	3	5	1,099	36	16	3	26	18	8	1	27	2½c.	1,031 77	.....	.....	1	
Capt. Thos. Dicks.....	1,550	51	7	3	26	1,550	50	14	0	16	25	7	0	8	2½c.	1,414 20	.....	.....	6	
George Dicks.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	5 60	5 81	.....	28	
Aaron Forsey.....	1,236	43	14	2	19	1,236	43	3	2	15	21	11	3	7	2c.	.....	.....	.....	.....	
" "	116	3	15	1	25	116	3	14	1	21	1	17	0	24	½c.	984 71	.....	.....	7	Wet.
Michael Forsey..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	3 39	5 07	.....	32	
Emmanuel Pike.....	222	8	4	0	5	222	8	2	0	7	4	1	0	3	2c.	181 50	.....	3 35	24	Stored at 3c. per sack.
John E. Horman.....	288	10	10	0	7	288	10	7	1	27	5	3	2	27	1¾c.	203 33	.....	.....	.....	
" "	52	1	9	2	22	52	1	9	0	26	....	14	2	15	½c.	8 18	1 27	.....	29	Wet.
" "	221	8	0	3	20	221	7	18	3	23	3	19	1	25	2½c.	222 52	82	.....	30	
Capt. Wm. Carter.....	704	27	1	1	19	704	26	15	0	15	12	17	2	7	2½c.	721 17	.....	.....	.....	*
" "	74	2	14	3	9	74	2	14	0	19	1	7	0	9	1½c.	45 49	2 92	.....	27	
Alexander Lemoine...	104	3	14	0	24	104	3	13	1	4	1	6	0	20	1¾c.	51 31	.....	.....	14	
George L. Frew.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	10	1	24	2c.	23 44	.....	.....	16	
Alexander Lemoine...	219	6	18	3	9	219	6	16	3	14	2	8	3	15	1¾c.	95 81	.....	.....	14	
George L. Frew... ..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	19	2	6	2c.	43 80	1 21	3 27	16	Stored at 3c. per sack.
James Newman.....	108	3	2	3	17	162	3	1	1	23	1	10	2	25	½c.	17 20	.....	.....	16	Wet.
	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	75 00	31	◇
	9,542	323	8	3	18	9,596	319	3	0	26	159	1	2	7	.....	$8,077 51	30 40	81 60	.....	

E. & O. E. St. Johns, August, 1893. HARVEY & CO.

*Salvor kept ½ ton, his portion (13 sacks).

◇ Storage, 50c. per ton, underwriters' lot.

Brig "J. E. Sayre."

Name.	Sacks.	Gross weight. T.	Cwt.	Qrs.	Lbs.	Tare.	Nett weight. T.	Cwt.	Qrs.	Lbs.	Price per lb.	$ cts.	Weigh-ng expenses.	Storage.	Order No.	
Charles Bennett	25		15	3	11	25		15	2	14	1c.	17 50			26	This sugar was all landed at one cent per pound salvage, became more or less damaged in boats.
Michael Gillam	25		15	3	11	25		15	2	14	"	17 50			25	
Emanuel Matthews	63	1	19	3	21	63	1	19	1	14	"	44 10			23	
John Hiscock	41	1	5	3	27	41	1	5	2	14	"	28 70			12	
William Currie	55	1	14	2	27	55	1	14	1	0	"	38 36			8	
Mark Childs	15		9	2	1	15		9	1	14	"	10 50			19	
William Stickland	26		16	1	26	26		16	1	0	"	18 20			21	
Isidore Saxey	35	1	2	0	21	35	1	1	3	14	"	24 50			17	
William Ford	27		17	0	13	27		16	3	14	"	18 90			15	
Austin Martin	65	2	1	1	11	65	2	0	3	2	"	45 66			11	
Joseph Morris	19		12	0	5	19		11	3	14	"	13 30			18	
William Vardy	50	1	11	2	9	50	1	11	0	15	"	34 87			10	
George Blackmore	25		15	3	11	25		15	2	14	"	17 50			20	
John Rodgers	24		15	0	24	24		15	0	0	"	16 80	1 17	14 85	9	
	495	15	13	2	22		15	9	1	13		$346 39	1 17	14 85		

E. & O. E.
St. Johns, Aug. 17th, 1893.

HARVEY & CO.

THE INSURANCE CO. OF NORTH AMERICA.

446 65

9—290

104 A. W. H. 16*a*.

The Atlantic Mutual Insurance Co. to Harvey & Co., Dr.

Brig "J. E. Sayre."

To paid salvors per our statement		No. 1.....	8,077 51
" " " "		No. 2.	346 39
" storage at Channel	"	No. 1.....	81 60
" " " "		No. 2.....	14 85
" weighing charges @ channel	"	No. 1.....	30 40
" " " "		No. 2.....	1 17
" for use of barrows and scales.....			20 00
" labor, &c., shipping sugar on S. S. *Tiber*			192 20
" Capt. Rouse on ac. of expenses.....			200 00
" Capt. Pike's board at Channel.....			20 00
" magistrate for attesting 5 bills at Channel.....			1 25
" for 200 empty sacks.....			40 00
" for sundry cables.....			41 60
To commission on estimated value of cargo received from brig *J. E. Sayre* custodied and reshipped by S. S. *Tiber*, $20,000.00 at 5 %			1,000 00
			$10,066 97

E. & O. E.
St. Johns, N. F., August 17th, 1893.

HARVEY & CO.

3 days' sight draft favor of Union bank for.....	$10,167.64
	$10,066.97
Add 1 % bank chg.....	100.67
	$10,167.64

(A. W. H. 17.)

Henry Dobell & Co.

Shipped, in good order and condition by Harvey & Co., of St. Johns, N. F., in and upon the S. S. *Tiber* or other steamer, whereof De Lisle is master for this present
105 voyage; and now lying in the port of Channel, and bound for Montreal, via Pieton, viz:

With liberty to call at any port or ports, and in such order as convenient to a ship, and to land the cargo, or any portion thereof, either going or returning, and to tow and assist vessels in all situations.

4,583 sacks dry sugar 153 tons 12 cwt. 0 qrs. 12 lbs — Four thousand five hundred and eighty-three sacks dry sugar weighing one hundred and fifty-three tons twelve hundredweight and twelve pounds shippers' account all on board to be delivered. Being marked and numbered as per margin; are to be delivered from ship's tackle in the like good order and well conditioned, at

the aforesaid port of Montreal (the act of God, the Queen's enemies, fire and all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted) unto Atlantic Mutual Insurance Co. of New York or to their assigns, he or they paying freight for said goods, at the rate of four dollars per ton of two thousand two hundred and forty pounds with average accustomed.

In witness whereof, the master or purser of said steamer hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the rest to stand void.

Dated at Channel this fourth day of August, 1893.

JOHN DELISLE,
For Master.

Weight and contents unknown. Leakage and breakage excepted.

(Endorsed:) Atlantic Mutual Insurance Co., by A. A. Raven, 2nd vice-pres.

106 (A. W. H. 18.)

Henry Dobell & Co.

Shipped, in good order and condition, by Harvey & Co. of St. Johns, N. F., in and upon the S. S. *Tiber* or other steamer whereof Delisle is master, for this present voyage; and now lying in the port of Channel, N. F., and bound for Montreal via Pieton, viz:

With liberty to call at port or ports, and in such order as convenient to the ship, and to land the cargo, or any portion thereof, either going or returning, and to tow and assist vessels in all situations.

4,596 sacks dry sugar 154 tons 2 cwt. 0 qrs. 13 lbs. 670 sacks wet sugar 20 tons 18 cwt. 2 qrs. 20 lbs.

Four thousand five hundred and ninety-six sacks dry sugar weighing one hundred and fifty-four tons two hundredweight and thirteen pounds *dry sugar* six hundred and seventy sacks wet sugar weighing twenty tons eighteen hundredweight two-quarters and seventy pounds shippers' account all on board to be delivered.

Being marked and numbered as per margin; are to be delivered from ship's tackles in the like good order and well conditioned, at the aforesaid port of Montreal (the act of God, the Queen's enemies, fire and all and

every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted) unto Atlantic Mutual Insurance Co. of New York or to their assigns, he or they paying freight for said goods at
107 the rate of four dollars per ton of two thousand two hundred and forty pounds with average accustomed.

In witness whereof, the master or purser of said steamer hath affirmed to three bills of lading all of this tenor and date; one of which being accomplished, the rest to stand void.

Dated at Channel, N. F., this fourth day of August, 1893.

JOHN DELISLE,
For Master.

Weight and contents unknown. Leakage and breakage excepted.

(Endorsed:) Atlantic Mutual Insurance Co., by A. A. Raven, 2nd vice-pres.

(A. W. H. 19.)

Henry Dobell & Co.

Shipped, in good order and condition, by Harvey & Co., of St. Johns, N F., in and upon the S. S. *Tiber* or other steamer, whereof De Lisle is master for this present voyage, and now lying in the port of Channel, and bound for Montreal via Pieton, viz:

With liberty to call at any port or ports, and in such order as convenient to the ship, and to land the cargo or any portion thereof, either going or returning, and to tow and assist vessels in all situations.

175 sacks wet sugar 5 tons 9 cwt. 1 qr. 23 lbs.

One hundred and seventy-five sacks wet sugar weighing five tons nine hundredweight one-quarter and twenty-three pounds. Shippers' account all on board to be delivered. Being marked and numbered as per margin; are to be delivered from ship's tackles in the like good order and well conditioned, at the aforesaid port of Montreal (the act of God, the Queen's enemies, fire
108 and all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted) unto Atlantic Mutual Insurance Co. of New York or to their assigns, he or they paying freight for said goods, at the rate of four dollars per ton of two thousand two hundred and forty pounds with average accustomed.

In witness whereof, the master or purser of said steamer hath affirmed to three bills of lading, all of this tenor

and date; one of which being accomplished, the rest to stand void.

Dated at Channel this fourth day of August, 1893.

JOHN DELISLE,
For Master.

Weight and contents unknown. Leakage and breakage excepted.

(Endorsed:) Atlantic Mutual Insurance Co., by A. A. Raven, 2nd vice-pres.

(R. G. P. 1.)

The Anglo-American Telegraph Company.

(Blank.)

Place from, St. Johns. No. words, 7. 12 Jul-, 1893.

To Capt. Pike, Channel:

Will telegraph limit to buy sugar today.

HARVEY & CO.

(*Telegram.*)

Place from, St. Johns. No. words, 38. 12 Jul-, 1893.

To Capt. Pike, Channel:

Buy all undamaged two cents damaged at such reduction you consider fair telegraph when you know about how much you
109 will have and we will send steamer for it buy any materials that you can make money on.

HARVEY & CO.

(*Telegram.*)

Place from, St. Johns. No. words, 22. 8 Jul-, 1893.

To Capt. Delaney, Channel:

Request purser remain protect underwriters' cargo get count of whole cargo telegraph us what number and approximate weight have some mats weighed.

HARVEY & CO.

(*Telegram.*)

Place from, St. Johns. No. words, 22. 10 Jul-, 1893.

To Capt. Pike, Channel:

Necessary to land all will have magistrate assist a little later on what is salvors' idea of price their half in bond.

HARVEY & CO.

(*Telegram.*)

Place from, ——. No. words, 10. 20 Jul-, 1893.

To Mr. Pike, purser S. S. *Grand Lake:*

Are arranging for freighting sugar please remain for the present.

HARVEY & CO.

1	2	3				4	5				6				7	8	9	10	11	12
		Gross weight.					Nett weight.				Salvor's share.									
Name.	No. sacks.	T.	Cwt.	Qrs.	Lbs.	Tare.	T.	Cwt.	Qrs.	Lbs.	T.	Cwt.	Qrs.	Lbs.	Price per lb.	$ cts.	Check No.	Weighing expenses.	Storage. $ cts.	
Capt. Solomon Gillam.	1,451	47	9	3	24	1,451	46	17	0	1	23	8	2	00	2½c.	1,311 80	4	5 44		
Capt. Adam Power....	2,098	67	17	0	11	2,098	66	18	1	13	23	17	0	7	2½c.	1,335 77	2 & 3			
Emanuel Matthews..	.....	...	...	...	...	.....	...	...	...	...	6	0	3	13	1¾c.	236 89	22			
Edward Gillam	.....	...	...	...	...	.....	...	...	...	...	2	12	0	18	1¾c.	102 23	13			
William Hickman.....	.....	...	...	...	...	.....	...	...	...	...	0	19	0	9	1¾c.	37 40	5	7 86		
Capt. John Eastman..	1,099	37	6	3	5	1,099	36	16	3	26	18	8	1	27	2½c.	1,031 77	1			
Capt. Thomas Dicks...	1,550	51	7	3	26	1,550	50	14	0	16	25	7	0	8	2½c.	1,414 20	6			
George Dicks	.....	...	...	...	...	.....	...	...	...	...	...	...	...	...	.....	5 60	28	5 81		
Aaron Forsey.....	1,236	43	14	2	19	1,236	43	3	2	15	21	11	3	7	2c.					
" "	116	3	15	1	25	116	3	14	1	21	1	7	0	24	½c.	984 71	7			
Michael Forsey.....	.....	...	...	...	...	.....	...	...	...	...	...	...	...	...	.....	3 39	32	5 07		
Emanuel Pike.....	222	8	4	0	5	222	8	2	0	7	4	1	0	3	2c.	181 42	24	.....	3 33	Three cents per sack.
John E. Harmon.....	288	10	10	0	7	288	10	7	1	27	5	3	2	27	1¾c.	203 33				
" "	52	1	9	2	22	52	1	9	0	26	0	14	2	13	½c.	8 18	29	1 27		
" "	221	8	0	3	20	221	7	18	3	23	3	19	1	25	2½c.	222 52	30	82		
Capt. William Corke..	704	27	1	1	19	704	26	15	0	15	12	17	2	7	2½c.	721 17	.....	2 92		
" " " ..	74	2	14	3	9	74	2	14	0	19	1	7	0	9	1½c.	45 49	27			
Alexander Le Moine..	104	3	14	0	24	104	3	13	1	4	1	6	0	20	1¾c.	51 31	14			
George Le Frene.....	.....	...	...	...	...	.....	...	...	...	...	0	10	1	24	2c.	23 44	16			
Alexander Le Moine..	219	6	18	3	9	219	6	16	3	14	2	8	3	15	1¾c.	95 81	14			
George Le Frene.....	.....	...	...	...	...	.....	...	...	...	...	0	19	2	6	2c.	43 80	16	1 21	3 27	Three cents per sack.
James Newman.....	108	3	2	3	17	162	3	1	1	23	1	10	2	25	½c.	17 20	31	.....	75 00	Fifty cents per ton for all underwriters' port.
																			20 00	For use barrows & scales.
																			192 20	Shipping on board *Tiber*.

R. G. PIKE.

111 R. G. P. 3.

1	2	3				4	5				6	7	8	9	10	11
		Gross weight.					Nett weight.									
Name.	No. sacks.	T.	Cwt.	Qrs.	Lbs.	Tare.	T.	Cwt.	Qrs.	Lbs.	Price per lb.	$ cts.	No.	Weighing.	Storage.	
Charles Bennett.....	25	0	15	3	11	25	0	15	2	14	1c.	17 50	26			This sugar was all landed at one cent per pound salvage and all became more or less damaged in boats.
Michael Gillam.....	25	0	15	3	11	25	0	15	2	14	1c.	17 50	25			
Emanuel Matthews...	63	1	19	3	21	63	1	19	1	14	1c.	44 10	23			
John Hiscock.....	41	1	5	3	27	41	1	5	2	14	1c.	28 70	12			
William Currie.....	55	1	14	2	27	55	1	14	1	00	1c.	38 36	8			
Mark Childs.....	15	0	9	2	1	15	0	9	1	14	1c.	10 50	19			
William Stickland....	26	0	16	1	26	26	0	16	1	00	1c.	18 20	21			
Isadore Saxey.....	35	1	2	0	21	35	1	1	3	14	1c.	24 40	17			
William Ford.....	27	0	17	0	13	27	0	16	3	14	1c.	18 90	15			
Austin Martin.....	65	2	1	1	15	65	2	0	3	2	1c.	45 66	11			
Joseph Morris.....	19	0	2	0	5	19	0	11	3	14	1c.	13 30	18			
William Vardy..... ...	50	1	11	2	9	50	1	11	0	15	1c.	34 87	10			
George Blackmore....	25	0	15	3	11	25	0	15	2	14	1c.	17 50	20			
John Rodgers.....	24	0	15	0	24	24	0	15	0	00	1c.	16 80	9	1 17	14 89	Three cents per sack.

R G. PIKE.

112 United States District Court, Southern District of New York.

THE CANADA SUGAR REFINING CO. vs. THE INSURANCE COMPANY OF N. America. } In Admiralty. Marine Insurance on Profits.

Butler, Notman, Joline & Mynderse, for lib.; Hand & Bonney, for resp'ts.

BROWN, *J.*:

On April 29, 1893, the respondent company insured for the libellant's benefit:

"$15,000 on profits on cargo sugar; against total loss only; valued at sum insured; shipped on board the British ship *John E. Sayre* at and from Iloilo to Montreal."

At that time the *Sayre* was at sea prosecuting the voyage. The libellant had 2,462 tons of sugars on board of her, amounting in value to $181,000, and had just completed insurance of the sugars to the amount of $166,145 in the Atlantic Mutual, of which insurance the respondent was informed before its insurance on profits was made. In July following the *Sayre* stranded on the coast of Newfoundland, and all the cargo was lost excepting about 300 tons which was saved by the aid of salvors, of which one-half went to them as their agreed compensation. The agreement was originally made by the master soon after the stranding; but a few days afterwards the agent of the Atlantic Mutual appeared to whom the master turned over the salvage operations. He confirmed the previous agreement with the salvors; reimbursed to the
113 master the expenses already incurred by him, and thenceforward, with the libellant's consent and the defendant's knowledge and acquiescence, took the complete control and disposition of the cargo. The agent eventually bought from the salvors the moieties of the sugars allotted to them under the agreement, and then shipped all the sugar saved to the order of the insurers, to Montreal. The value of all the sugar that reached Montreal was about $20,000, and the expenses and salvage charges paid by the Atlantic Mutual thereon, and the additional freight to Montreal exceeded $11,000, so that out of the whole cargo worth $181,000, less than $9,000, net was saved. The Atlantic Mutual settled with the libellant as for a constructive total loss, under its policy of $166,145, and it turned over the sugars saved in part settlement of that sum, on about the basis of the average *pro rata* policy valuation. The respondent contests its liability upon the policy on profits on the ground chiefly that the receipt by the libellant of a portion of the sugars, viz, about $20,000 in value, prevents the loss from being "total" within the terms of its policy.

The intention of both parties, I cannot doubt, was to insure under the designation of "profits" the interest of the libellant in this cargo over and above the sum of $166,145, for which the sugars were already insured in the Atlantic Mutual. The excess of the market

value over that sum was at that time equal to the insurance of profits. It was a valued policy; and the provision as to "total loss only," is the ordinary provision of those policies which admit abandonment when the loss exceeds one-half the value, and is not the special limitation to an "*actual* total loss," which requires the destruction of the entire property in order to entitle the assured to recover anything.

Upon the facts in proof, I cannot sustain the defense in any aspect of the case. The subject of this policy was "profits" alone. The facts show that by the stranding all "profits" were utterly destroyed, and very much more. There was clearly a total loss of the
114 subject insured, viz, profits. No notice of abandonment of profits was necessary, as all possibility of "profits" was manifestly gone, and no remnant of profits remained which could be abandoned to the defendant.

As respects the sugars themselves, moreover, there was a practical abandonment to the Atlantic Mutual, the insurers on cargo. On their policy there was a constructive total loss, since not one-tenth net value of their policy was saved. That company's rights as respects any abandonment were superior; and the defendant company could not legally have any abandonment to itself as insurer on profits, except on payment to the insurer of cargo of the whole amount of the latter's liability—in this case an absurd alternative. A policy on profits in a case like this precludes any possibility of an abandonment by the assured by his own act alone; and hence no attempt to abandon to the defendant was required.

Mumford *v.* Hallet., 1 Johns, 433, 439.
Tom *v.* Smith, 3 Caines, 245, 251.

The receipt of about one-eighth of this cargo by the libellant in the manner above described does not affect the libellant's right to recover as for a "total loss:" (1) because upon every pound of sugar rescued more than half its value had been paid in order to recover it, so that there was not only an actual total loss of "profits," but a constructive total loss of the sugar as well, and insurance on profits is subject to a constructive total loss (Abbot *v.* Secor, 3 Johns. Cases, 39, 46); (2) because none of the sugar ever came to the libellant in the ordinary course of the voyage, or through any delivery to the libellant as consignee by the carrier; but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libellant upon an
115 equitable basis in part payment, and as the equivalent of its value in cash, as any other property might have been received.

Decree for the libellant with costs.

Dated June 3, '97.

At a stated term of the United States district court for the southern district of New York, held at the post-office building, in the city of New York, on the 15th day of June, 1897.

Present: Hon. Addison Brown, district judge.

CANADA SUGAR REFINING COMPANY, LIMITED, Libellant,
against
INSURANCE COMPANY OF NORTH AMERICA, Respondent.

This case having come regularly on to be heard, and having been submitted upon the pleadings, proceedings and proofs, and after hearing arguments of the proctors for the respective parties herein, and due deliberation having been had in the premises, now, upon motion of Butler, Stillman & Hubbard, proctors for libellant, it is—

Ordered, adjudged and decreed, that the libellant recover of the respondent the principal sum of fifteen thousand ($15,000) dollars, together with interest thereon from the 15th day of March, 1894, to the date of this decree in the further sum of two thousand nine hundred and twenty-five ($2,925) dollars, together with their costs as taxed in the further sum of one hundred and thirty-one and $\frac{45}{100}$ ($131.45) dollars, amounting in all to the total sum of eighteen thousand and fifty-six and $\frac{45}{100}$ ($18,056.45) dollars, and that they have judgment therefor. And it is further—

116

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time and in the manner prescribed by law and by the rules and practice of this court, or this decree be sooner satisfied, execution issue against the said respondent.

ADDISON BROWN.

(Endorsed:) Decree. Filed June 15, 1897.

District Court of the United States for the Southern District of New York.

CANADA SUGAR REFINING COMPANY, LIMITED, Libellant,
against
INSURANCE COMPANY OF NORTH AMERICA, Respondent.

SIRS: Please take notice that The Insurance Company of North America, the respondent, hereby appeals to the United States circuit court of appeals for the second circuit from the final decree made and entered herein in favor of the said libellant, and against the said respondent, for the sum of eighteen thousand and fifty-six and 45/100 dollars bearing date the 15th day of June, eighteen hundred and ninety-seven, and from each and every part of such decree.

117

Dated New York, June 16th, 1897.

Yours, &c.,
HAND & BONNEY,
Proctors for Respondent.

To Butler, Stillman & Hubbard, Esqs., proctors for libellant.
" Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed June 16, 1897.

United States Circuit Court of Appeals for the Second Circuit.

CANADA SUGAR REFINING COMPANY, LIMITED, Libellant and Appellee,
vs.
INSURANCE COMPANY OF NORTH AMERICA, Respondent and Appellant.

The above-named respondent and appellant hereby assigns error in the decision and final decree of the district court of the United States for the southern district of New York in the above-entitled cause in the following particulars:

First. In that the said district court adjudged and decreed that the libellant should recover of the respondent the sum of eighteen thousand and fifty-six $\frac{45}{100}$ dollars or in any sum whatever.

118 Second. In that the said district court did not make a decree dismissing the libel with costs of the said court to the respondent.

Third. In that, in view of the circumstance that a substantial part of the cargo was saved and delivered to the libellant, the said district court did not dismiss the libel with costs to the respondent.

Fourth. In that said district court found and held that the receipt of a substantial part of the cargo by the libellant did not affect libellant's right to recover as for a total loss.

Fifth. In that said district court found and held that there was an actual total loss of profits to the libellant.

Sixth. In that said district court found and held that the insurance on profits was subject to a constructive total loss of the cargo.

Seventh. In that the said district court found and held that none of the sugar ever came to the libellant in the ordinary course of the voyage or through any delivery to the libellant as consignee by the carrier, but only through delivery by the insurer of cargo, and that as a consequence the receipt of about one-eighth of the cargo by the libellant did not affect the libellant's right to recover as for a total loss.

Eighth. In that the said district court failed or refused to find and decide that the only risk undertaken by the respondent under its agreement of insurance in this case was for fifteen thousand dollars on profits on cargo of sugar against total loss only valued at sum insured and was discharged by safe arrival at the port of destination of a substantial part of the said cargo.

Dated Aug. 23d, 1897.

HAND & BONNEY,
Proctors for Respondent, Appellant.

(Endorsed:) Assignment of errors. Filed September 29th, 1897.

119 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

THE CANADA SUGAR REFINING COMPANY, Libellant and Appellee,
vs.
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent and Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals for the second circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the south-
[SEAL.] ern district of New York, this 22d day of November, in the year of our Lord one thousand eight hundred and ninety-seven and of the Independence of the said United States the one hundred and twenty-second.

SAMUEL H. LYMAN, *Clerk.*

120 United States Circuit Court of Appeals, Second Circuit.

THE CANADA SUGAR REFINING COMPANY, LIMITED, Appellee,
vs.
THE INSURANCE COMPANY OF NORTH AMERICA, Appellant.

WALLACE, *Circuit Judge:*

The libel in this cause was filed to recover upon a contract of insurance with the libellant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy, No. 117,407, against perils of the sea, "15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre, at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient toward fully covering the property at risk. The sugar was owned by the libellant, consisted of about 2,460 tons, was of the value of about $181,000, and was insured for $166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libellant and an advance in market price since its purchase by the libellant, and when the insurance with the appellant was affected there had been a still further advance in market price, so that
121 the insurance on profits really covered a profit which has accrued to the libellant when it was affected. The appellant had been informed by the libellant of the insurance upon the cargo. July 6th the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The master at once made arrange-

ments with local salvors for saving and storing the cargo, agreeing to give them one-half saved. The salvors removed from the ship to their own vessels all the cargo capable of being saved. The master was about to arrange for the transportation to Montreal of the part not going to the salvors when the Atlantic Mutual Insurance Company, which had meantime been informed of the disaster, intervened and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one-half of the sugar saved, and caused the sugar saved to be reconditioned and shipped to Montreal on the steamer Tiber and delivered upon arrival there to the libellant. The expenses incurred by the Atlantic Mutual Insurance Company for reconditioning and forwarding the cargo and adjusting the claims of the salvors, amounted to $10,167. That com-
W. P. pany also paid the ocean freight upon the quantity of cargo saved. It adjusted the loss with the libellant by paying the equivalent of the whole amount of its policy less
W. P. the insured value of the sugar delivered to the libellant. The cargo delivered to the libellant consisted of 307 tons of dry sugar and about 26 tons of wet, and was of the value of about $20,000. There was no notice of abandonment
122 given to the appellant.

Upon these facts the court below was of the opinion that there had been a total loss of the profits insured within the meaning of the contract, and decreed accordingly for the full amount of the insurance.

The subject of insurance was not the libellant's cargo of sugars, but the profits, and the total loss to which the liability of the underwriter was restricted by the contract of the parties was a total loss of profits. That there was no actual total loss of profits is entirely clear. Insurance of profits of a cargo is an engagement by the underwriter that the goods shall not be prevented by the perils insured against from arriving at their destination in a condition for earning profits; and in a valued policy the parties fix, for the purpose of adjusting a loss, the sum which the cargo would earn upon safe arrival by way of profits. Under an insurance of profits a loss of cargo carries with it, of course, the loss of the profits—at least is *prima facie* evidence of their loss; and under a valid policy the assured is entitled to recover the whole insurance upon proof of a total loss of the goods, without proof that any profits would have been made if the goods had arrived. Barclay *v.* Cousins (2 East., 544); Potapsco Insurance Company *v.* Coulter (3 Peters, 222); Mumford *v.* Hallett (1 Johns., 439); Fosdick *v.* North American Marine Insurance Company (3 Day, 103); French *v.* Hope Insurance Company (16 Pickering, 397). "If a part of the goods only are prevented from arriving, it constitutes a partial loss
123 of those interests, according to the construction put upon it in the United States." 2 Phillips on Insurance, sec. 1503. In other words, there can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (Loomis *v.* Shaw, 2 Johns. Cases, 36), notwithstanding a greater part have been

destroyed by the perils insured against. Wain *v.* Thompson (9 S. & R., 115). In such a case, under a valid policy, the insured can only recover of the underwriter the valuation less the profits to be accounted for. French *v.* The Hope Insurance Company, *supra*. It is only in a case of total loss that there is any difference between an open and valued policy. Marshall on Insurance, 268, 618; Bateman's Commercial Law, sec. 1129. In the present case the value of the cargo saved was comparatively insignificant, being only about $10,000, after deducting salvage and expenses, or alternatively something over 150 tons of dry sugar out of 2,460 tons; but part having been saved and actually received by the libellant, there was not an actual total loss. A loss of part of the cargo is a proportional loss on profits.

The question, then, arises whether the libellant was entitled to recover upon the theory of a constructive total loss. A constructive total loss is one where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of
124 the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. So also it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total loss, except in those where it could not possibly be of any benefit to the insurer.

By the later authorities it is settled that under a policy insuring a ship or cargo against "total loss only" the assured is entitled to recover upon proof of a constructive total loss. Adams *v.* MacKenzie (13 C. B. N. S., 422); Heebner *v.* Eagle Insurance Company (10 Gray, 131); Green *v.* Pacific Insurance Company (9 Allen, 217); Burt *v.* Brewers and Malsters Insurance Company (78 N. Y., 400); Carr *v.* Security Insurance Company (109 N. Y., 504); Snow *v.* Union Mutual and Marine Insurance Company (119 Mass., 592). It is a reasonable intendment that when an underwriter offers to indemnify the insured against a "total loss" he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability he can protect himself by insuring against actual or absolute total loss. It does not necessarily follow that these words are to be given the
125 same meaning in a policy upon profits as in a policy upon cargo, and our opinion is that they cannot have the same meaning. How can there be a constructive total loss of profits? In all cases where the destruction of the voyage or the damage to the cargo renders it impracticable, because the outlay will exceed the returns, to go on with the adventure, there is an actual total loss

of profits, though it may be there is only a constructive total loss of the cargo. The moiety rule cannot apply because the profits cannot be separated from the goods themselves, and an abandonment is ordinarily so impracticable that the rule cannot be supposed to have entered into the contemplation of the parties when making their contract. It has never been decided that in case of an insurance of profits an actual partial loss of the profits can be made total by abandonment, and the commentators incline to the contrary view. Mr. Phillips says: "On the whole, it does not seem that the rule of constructive loss of over fifty per cent. of the value is applicable to a policy on profits in favor of the owner of the goods under any circumstances." Phillips on Insurance, 1656. Prof. Parsons, after intimating that an actual partial loss of profits cannot be made constructively total by abandonment, uses this language: "It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits unless the insurer (the assured) should waive his right to abandon the goods, and treating the loss of them as partial, abandon the profits separately. In theory this might be possible, but it would be attended with some diffi-
126 culties and can hardly be considered as in fact practicable." 2 Parsons on Marine Insurance, 170, 171. If there can be no constructive loss of profits, the words "against total loss only" in an insurance upon profits can only refer to an actual total loss. They certainly cannot refer to a partial loss. They can have no effect whatever if, as has happened here, the assured can retain part of the profits and yet recover as though all have been lost.

The present contract, in view of the extrinsic facts, was intended to be in substance a second insurance on the goods themselves, "another way of valuing the goods"—Tom *v.* Smith (3 Caines, 247)—to cover the value represented by the advance in market price and not adequately protected by prior insurance. See Ionides *v.* Pender, L. R., 9 Q. B., 531–536. Indeed, it is customary at the place where this contract was made to insure profits under the general denomination of "goods." Pritchett *v.* Insurance Company of North America (3 Yeates, 461). If the cargo itself instead of the profits had been the interest insured, the libellant would have been indemnified only to the extent that the prior insurance might prove insufficient. Insurance is a contract of indemnity and cannot extend to cover the loss in excess of the real loss, and even under a valued policy, where there is a prior insurance, the assured cannot recover upon it more than will, with what has been received from the prior insurance, make up his whole loss. Craige *v.* Murgatroid (4 Yeates, 161); Watson *v.* Insurance Company of North
127 America (3 Wash. C. C., 1); Stevenson *v.* Piscataqua Insurance Company (54 Me., 71); Pleasance *v.* Maryland Insurance Company (8 Cranch, 55). The property at risk was really the cargo, because the profits were merely an excrescence of the goods; and if the contract had not been "against total loss only," the appellant would have been liable only for the deficiency. It cannot be that the insertion of these words were intended to enlarge the extent of the appellant's liability. They were meant to restrict it.

They were used in view of the doctrine expressed by the commentators upon insurance, that there cannot be a constructive total loss of profits. We think the insurance was placed upon the profits instead of upon the cargo directly, and restricted to a total loss only to save any question as to the liability of the appellant for a partial or constructive total loss; otherwise there would have been no occasion for naming that interest and the insurance would have been upon the cargo itself.

By the decree of the court below the libellant has been awarded a recovery which, if collected, would put into its pocket the
W. P. profits realized on the cargo saved, in addition to the amount of the respondent's policy. Irrespective of this consideration, and because it has received the profits on a part of the cargo, we are of the opinion that there has not been a total loss of profits within the meaning of the contract.

The decree is reversed with costs and with direction to dismiss the libel.

128 (Endorsed:) United States circuit court of appeals, second circuit. The Canada Sugar Refining Company, Ltd., appellee, *vs.* The Insurance Company of North America, appellant. Opinion, Wallace, C. J. United States circuit court of appeals, second circuit. Filed Apr. 19, 1898. William Parkin, clerk.

129 At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms, in the city of New York, on the 23rd day of April, eighteen hundred and ninety-eight.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

CANADA SUGAR REFINING COMPANY, LIMITED, Libellant and Appellee,
against
THE INSURANCE COMPANY OF NORTH AMERICA, Respondent and Appellant.

The appeal from the decree of the district court of the United States for the southern district of New York, filed and entered in this action on the fifteenth day of June, eighteen hundred and ninety-seven, having come on to be heard, and due deliberation having been had, and on motion of Geo. B. Bonney, Esq., of counsel for the respondent, appellant—

It is ordered, adjudged, and decreed that the said decree so appealed from be reversed, and that the libel be dismissed, with costs in both courts to the said appellant.

And it is further ordered that the mandate of this court issue to the said district court of the United States for the south-
E. H. L. ern district of New York, directing the court to proceed in accordance with this order.

Notice of presentation of this decree for settlement is waived.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant.

Endorsed: U. S. circuit court of appeals for second circuit. Canada Sugar Refining Company, libellant, appellee, *vs.* The Insurance Co. of North America, respondent, appellant. Order for mandate. Hand & Bonney, proctors for appellant, 51 Wall St., New York city. United States circuit court of appeals, s-cond circuit. Filed Apr. 23, 1898. William Parkin, clerk.

130 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 129, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Canada Sugar Refining Company, libellant, appellee, against The Insurance Company of North America, respondent, appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23rd day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

131 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Insurance Company of North America is appellant and The Canada Sugar Refining Company, Limited, is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
132 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

133 [Endorsed:] Supreme Court of the United States. No. 651, October term, 1897. The Canada Sugar Refining Co., Limited, *vs.* The Insurance Co. of North America. Writ of certiorari.

134 United States Circuit Court of Appeals for the Second Circuit.

CANADA SUGAR REFINING COMPANY, LIMITED, Libellant,
against
INSURANCE COMPANY OF NORTH AMERICA, Respondent.

It is hereby stipulated that the copy of the transcript of record heretofore certified by the clerk of this court on or about the 27th day of April, 1898, and filed in the Supreme Court with the libellant's petition for a writ of certiorari, be taken as a return to said writ up to the date of such certification, and that the clerk now make further return only of such proceedings as may have been subsequently had in this court, together with a copy of this stipulation.

Dated New York, May 11th, 1898.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant.
HAND & BONNEY, *Proctors for Respondent.*
BUTLER, STILLMAN & HUBBARD,
Proctors for Lib't in U. S. District Court.

Endorsed: U. S. circuit court of appeals, second circuit. Canada Sugar Refining Co., libellant, against Insurance Company of North America, respondent. Stipulation. Butler, Notman, Joline & Mynderse, proctors for libellant, 54 Wall street, New York city. United States circuit court of appeals, second circuit. Filed May 19, 1898. William Parkin, clerk.

A true copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

135 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, May 19th, 1898.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

136 [Endorsed:] United States circuit court of appeals, second circuit. Canada Sugar Refining Company *vs.* Insurance Company of North America. Return to writ of certiorari.

137 [Endorsed:] Case No. 16,864. Supreme Court U. S., October term, 1898. Term No., 290. The Canada Sugar Refining Co. (Limited), petitioner, *vs.* The Insurance Company of North America. Writ of certiorari and return. Filed June 7, 1898.

Endorsed on cover: Case No. 16,864. U. S. C. C. of appeals, second circuit. Term No., 290. The Canada Sugar Refining Company (Limited), petitioner, *vs.* The Insurance Company of North America. Filed April 30, 1898.

651 App. 69.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY (LIMITED),
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Petition of Libellant for Writ of Certiorari.

WILHELMUS MYNDERSE,
Advocate.

United States Circuit Court of Appeals

FOR THE SECOND JUDICIAL CIRCUIT.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Notice is hereby given that upon the petition of the libellant, verified the 27th day of April, 1898, and upon all the pleadings and proceedings herein, we shall on Monday, the 2d day of May, 1898, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the Capitol, in the City of Washington.

New York, April 27, 1898.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant.

To HAND & BONNEY,
Proctors for Respondent.

4 SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,
against
THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

5 And now comes the Canada Sugar Refining Company, Limited, by Wilhelmus Mynderse, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein The Canada Sugar Refining Company, Limited, was libellant and The Insurance Company of North America was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

6

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the Canada Sugar Refining Company, Limited, that a writ of *certiorari* may issue to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit to bring before the Supreme Court a certain case wherein the said Canada Sugar Refining Company, Limited, is libellant, against the Insurance Company of North America, respectfully shows:

FIRST.—At all the times hereinafter mentioned the petitioner was a corporation organized and existing pur-

suant to the laws of the Dominion of Canada, and there 7
engaged in the importation of raw sugars and the refining thereof, and at all such times the respondent was, ever since, has been and still is a corporation organized and existing under and pursuant to the laws of the State of Pennsylvania, and lawfully engaged in the business of marine insurance.

SECOND.—At divers times between January 20, 1893, and February 8, 1893, the petitioner caused to be shipped at Iloilo for its account by Kerr & Company of Iloilo upon the ship *John E. Sayre* 73,089 mats of sugar, weighing about 39,360 piculs, being about 2,462 tons, to be delivered at Montreal, Canada.

THIRD.—At divers dates, to wit, December 9, 1892, and 8
in March, 1893, and in April, 1893, the petitioner caused the sugars to be insured by the Atlantic Mutual Insurance Company to cover from time to time the increased market value of the sugars, the market therefor being a rapidly rising market. The insurance of the sugars by the Atlantic Mutual Insurance Company was finally completed prior to the 29th day of April, 1893, at $166,145, the *John E. Sayre* being then at sea bound on her voyage from Iloilo to Montreal.

FOURTH.—The petitioner further alleges that on the 29th day of April, 1893, the said *John E. Sayre* being at sea as aforesaid, and the value of the sugars, exclusive of freight, being then about $181,000, and there being a value in excess of the insurance placed thereon by the petitioner 9
with the Atlantic Mutual Insurance Company, it caused its profits upon the sugars, being then valued at $15,000, to be insured by the Insurance Company of North America in said valued amount of $15,000 for the voyage from Iloilo to Montreal, under a certificate of insurance issued to the petitioner in the following words:

"INSURANCE COMPANY OF NORTH AMERICA.

"$15,000. PHILADELPHIA. No. 39,600.

"This is to certify that on the 29th day of April,
"1893, this company insured under policy No. 117407,

10 "made for Robert Hampson, $15,000^{00}_{100}$ dollars on "profits on cargo of sugar against total loss "only, valued at sum insured, shipped on board "of the British ship *John E. Sayre* at and "from Iloilo to Montreal, and the loss if any "subject to the terms and conditions of the policy "has been made payable to the order of Canada Sugar "Refining Company, Limited, on surrender of this certi-"ficate.

"GRENTLER FRYER, Secretary.
"WILLIAM A. PLATT, Second Vice-President.

"Not valid unless countersigned by the company's "duly authorized agent at Montreal.
"Countersigned at Montreal this 29th day of April, 1893.

11 "ROBERT HAMPSON, Agent.

"Incorporated 1794."

FIFTH.—The petitioner further shows that the ship *John E. Sayre* being at the time in every way fitted for her contemplated voyage, sailed from Iloilo with said sugars on board on the 10th day of February, 1893, bound for Montreal; and on the 4th day of July, 1893, the said ship being still in the prosecution of her voyage, met with heavy fog off the coast of Newfoundland, and in the early morning of July 6th, during the prevalence of such fog, stranded on the coast of Newfoundland about eleven miles east of Cape Ray and about one mile east of the entrance to Port Au Basque Harbor, and that she sub-
12 sequently at such place of stranding became a total wreck.

The petitioner on the 6th day of July, and immediately upon receiving advices of the distress that had come to the said ship informed the underwriters thereof, and the Atlantic Mutual Insurance Company thereupon assumed and undertook to take such possession of the cargo as was possible, and dispatched vessels to the relief of the *John E. Sayre*, and in conjunction with the master of the vessel employed salvors to save the sugars under an agreement that the salvors, who were residents in Newfoundland, should receive one-half of the sugars as salvage compensation.

The said insurers incurred other expenses in the em- 13
ployment of vessels and agents and surveyors, in addition to the obligations incurred under the agreement with the salvors, and by their efforts a certain amount of the cargo, to wit, 9,900 mats, many of which were in wet and damaged condition, weighing about 325 tons, were taken out of the *John E. Sayre* by small sailing craft and landed in Newfoundland.

Pursuant to the terms of the salvage agreement the salvors became entitled to receive one-half of the sugars so landed as salvage compensation, and thereafter the insurers adjusted the claims and rights of the salvors purchasing from them their interest in the sugars at a price substantially one-half of the value of the sugars.

Thereupon the insurers, the Atlantic Mutual Insurance 14
Company, brought the said 325 tons of sugars to Montreal. The transportation was by the steamer *Tiber*, under bills of lading reciting that the sugars were shipped at Channel, Newfoundland, by Harvey & Co., who were the resident agents of the insurers, and consigned to the Atlantic Mutual Insurance Company.

There an adjustment was made between the Atlantic Mutual Insurance Company and the petitioner, whereby the petitioner took over from the Atlantic Mutual Insurance Company, in part payment of its loss, the said 325 tons of sugars in their damaged condition at an agreed and reasonable value, and received from the Atlantic Mutual Insurance Company in cash the balance of the policy of insurance upon the sugars in the amount of 15
$142,748.81.

SIXTH.—The petitioner further shows that this adjustment then and there made between the petitioner and the Atlantic Mutual Insurance Company fully satisfied the claims of the petitioner against the Atlantic Mutual Insurance Company, by giving to the petitioner property and money aggregating in value the exact sum of the insurance, to wit, $166,145.

SEVENTH.—The petitioner further alleges that the profits insured by the Insurance Company of North America

16 in the amount of $15,000 were wholly lost by reason of the disaster which came to the ship *John E. Sayre* and the perils to which the sugars were subjected.

EIGHTH.—The petitioner in due course presented proofs of such loss, and upon the claim being rejected by the Insurance Company of North America, filed its libel *in personam* in the District Court of the United States for the Southern District of New York, on the 27th day of November, 1894.

The libel set forth the circumstances of the shipment and insurance and loss of the sugars as hereinbefore stated, and alleged that the profits of the libellant upon the cargo had become a total loss.

17 On the 25th day of January, 1895, the Insurance Company of North America filed its answer to the libel, by which it admitted that at the time of making the insurance upon the profits the real value of the sugars was $181,000, and that the profits of the libellant had been insured as alleged in the amount of $15,000, and that the total value of the sugars which reached Montreal was "about $20,000." The defence of the insurer rested upon the allegation that by reason of the saving and delivering of a part of the cargo at Montreal, the insurer became relieved and discharged from all liability to the libellant under its contract of insurance.

NINTH.—The case came on for trial in the District Court
18 before the Honorable ADDISON BROWN, District Judge, December 7, 1896. Upon the trial proofs were presented by the libellant that it had substantially abandoned the sugars to the Atlantic Mutual Insurance Company, who had thereupon taken charge of the salvage operations and had purchased from the salvors their interest in the saved sugars, and had shipped the said sugars in a damaged condition to Montreal in their own name, and had subsequently effected an adjustment with the libellant by which the remnant of sugars was taken over by the libellant at an agreed valuation, the balance of the Atlantic Mutual policy in the amount of $142,748.81 being paid in cash.

The respondent offered no proofs. 19

On the 3d day of June, 1897, the learned District Judge filed his opinion, in which he held that he could not sustain the defense of the insurers in any aspect of the case. He held:

"There was a practical abandonment to the Atlantic "Mutual, the insurers on cargo. On their policy there "was a constructive total loss, since not one-tenth net "value of their policy was saved. That company's rights "as respects any abandonment were superior; and the "defendant company could not legally have any aband- "onment to itself as insurer on profits, except on payment "to the insurer on cargo of the whole amount of the lat- "ter's liability—in this case an absurd alternative. A "policy on profits in a case like this precludes any possi- "bility of an abandonment by the assured by his own act "alone; and hence no attempt to abandon to the defend- 20 "ant was required."

The learned District Judge further held "The Atlantic "Mutual settled with the petitioner as and for a construc- "tive total loss under its policy of $166,145, and it turned "over the sugars saved in part settlement of that sum on "about the basis of the axerage *pro rata* policy valua- "tion," and also said:

"The receipt of about one eighth of this cargo by "the libellant in the manner above described does not "affect the libellant's right to recover as for a 'total "loss'; (1) because upon every pound of sugar rescued "more than half its value had been paid in order "to recover it, so that there was not only an actual total "loss of 'profits' but a constructive total loss of the sugar "as well, and insurance on profits is subject to a con- "structive total loss; (2) because none of the sugar ever "came to the libellant in the ordinary course of the 21 "voyage or through any delivery to the libellant as con- "signee by the carrier; but only through a delivery by the "insurer of cargo after practical abandonment to the latter "and through a settlement by the insurer as upon a total "loss, in which the sugar was received by the libellant "upon an equitable basis in part payment and as the "equivalent of its value in cash, as any other property "might have been received."

Thereupon and on the 15th day of June, 1897, a decree was entered in favor of the libellant for the amount of the insurance, with interest and costs, in the aggregate amount of $18,056.45.

22 TENTH.—Appeal was taken by the respondent from this decree to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in March, 1898. A decision was filed April 18, 1898, reversing the decree of the District Court and directing that the libel be dismissed.

Subsequently, and on the 22d day of April, 1898, an order was entered accordingly in the said United States Circuit Court of Appeals directing the issuance of a mandate to the District Court to carry out the provisions of the decree.

ELEVENTH.—The opinion of the Circuit Court of Appeals proceeds upon the theory that there can be no con-
23 structive total loss of profits, while recognizing that the American Courts establish a fifty per cent. loss as a foundation for a constructive total loss of either goods or vessel. *No judicial authority* for the distinction between a constructive total loss on profits, and a constructive total loss on goods or vessel is cited by the Circuit Court of Appeals, although their decision upon such question is directly opposed to that of the District Judge.

Reference is however made by the Circuit Court of Appeals to certain text writers who intimate that the rule of constructive total loss of over fifty per cent. of the value is not applicable to a policy on profits in favor of the owner of the goods.

Upon this point there is unquestionably *a difference of opinion among text writers* (when a portion of a ship-
24 ment is delivered in sound condition), and there is an entire absence of authoritative American judicial decision, the nearest approach to such decision being a somewhat inconclusive remark of Mr. Justice Kent, when he says:

> "What shall be the criterion of an average or total loss "in respect to profits, I cannot at present with clearness "decide. Perhaps the established rule in respect to ship "and cargo of a loss of more or less than half the subject "in value may be applicable. If so the question here will "be whether the more profitable half of the cargo might "not have been brought in the same ship to New York. "I suggest this as a rule that may perhaps apply."
>
> *Abbott* v. *Sebor*, 3 *Johnson's Cases*, 39, 46.

TWELFTH.—The learned Judges of the Circuit Court of 25
Appeals have, it is respectfully submitted, erred in holding against the finding of the learned District Judge, that there was not in this case an absolute total loss to the petitioner of its profits.

They have fallen into error in this respect by overlooking the fact that each and every pound of the sugars saved from the *John E. Sayre* was burdened with the salvor's lien of fifty per cent., which far exceeded the ratio of insured profits.

They have overlooked also the circumstance that the sugars were practically abandoned, as found by the learned District Judge, to the cargo insurer, and that such abandonment was accepted and that the insurer on the sugars reduced such sugars to its own possession. 26

They have overlooked the fact that the sugars were not delivered to the petitioner by virtue of any contract of carriage or in any ordinary course, but that they were turned over by the insurer of the sugars to the petitioner in part payment of the insurer's liability just as any other property might by agreement have passed from one to the other.

They have erred in holding that there can be no constructive total loss of profits, and they have fallen into this error through the cautious intimations of certain text writers whose remarks upon this subject relate to circumstances where a certain portion of the goods (in respect of which profits were insured) have in ordinary course reached to destination in sound condition and been de- 27
livered by the carrier to the assured in regular course of transportation.

They have failed to note the distinction in this case that the sugars which came to Montreal were never delivered by the carrier to the petitioner, and that the sugars which survived the wreck were reduced by salvage charges and by physical injuries to a sum much less than one-half of the sound value of such sugars.

THIRTEENTH.—The Circuit Court of Appeals have further erred respecting the facts of the case before them in saying:

28 "By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket the profits realized on the cargo saved "in addition to the amount of the respondent's policy. "Irrespective of this consideration and because it has "received the profits on a part of the cargo, we are of the "opinion that there has not been a total loss of profits "within the meaning of the contract."

It is error to suppose that any profits survived. The value of the cargo was about $181,000, by admission of the pleadings. This amount was covered by an insurance of $166,145 in the Atlantic Mutual Insurance Company, upon cargo, and by $15,000 in the Insurance Company of North America on profits.

29 All that the petitioner ever received was $142,748.81 in cash from the Atlantic Mutual Insurance Company and the 325 tons of damaged sugars which reached Montreal.

It thus appears that the damaged sugar was taken over at a valuation of $23,396.19, in its damaged and unassorted condition. This was its full value. The pleadings more than admit that it was worth only "about $20,000" (*Answer, fol.* 67). Mr. Drummond's testimony shows that the value at which the sugar was taken was its fair, actual value in its damaged condition.

The entire payment from the Atlantic Mutual Insurance Company to the petitioner in cash and in sugars thus aggregated not more than $166,145, and if the decree of the
30 District Court should be enforced the amount paid to the petitioner would bring its collections up barely to the $181,000 which the sugars were actually worth, as admitted by the pleadings.

There is absolutely no point of view in which it can be said that the payment of the District Court would result in putting $10,000 or any other sum whatever in the pockets of the petitioner in excess of its actual loss.

A similar error has been made by the Circuit Court of Appeals in adopting the premise that the petitioner "has received the profits on a part of the cargo." The petitioner received a part of the cargo practically by barter

and sale from the Atlantic Mutual Insurance Company. 31
It received those goods at their value and without profits.

FOURTEENTH.—Your petitioner avers that this case is one in which it is proper for the Court to issue a writ of *certiorari* for the following reasons:

First.—Because there is no authoritative judicial decision in this country upon the point as to what constitutes a total loss of profits.

Second.—Because there is no authoritative judicial decision in the United States as to whether a constructive total loss of profits is permissible.

Third.—Because the Circuit Court of Appeals have 32
erred in holding that the payment of the petitioner's claim would result in more than indemnity to the petitioner.

Fourth.—Because the Circuit Court of Appeals have erred in holding both as matter of fact and law that the petitioner has received the profits on a part of its cargo.

Fifth.—Because there is disagreement between the learned District Judge and the Judges of the Circuit Court of Appeals in respect of the rules of law applicable to the case.

Sixth.—Because the leading judicial decision in Eng- 33
land (*Asfar & Co.* v. *Blondell, Law Rep.*, 1 *Q. B.*, 1895-6, *p.* 123) is directly opposed to the principles of law announced by the Circuit Court of Appeals. This decision is entitled to special consideration not only because of the general harmony between the law of Great Britain and of the United States upon questions of commercial law, but because the insurance herein was made and the loss occurred within the territorial jurisdiction of Great Britain.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this case before this

Honorable Court and for such other relief as to this Honorable Court may seem just.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
By HEWLETT & LEE, Agents.

CITY AND COUNTY OF NEW YORK, }
Southern District of New York, } ss.:

GEORGE HEWLETT, being duly sworn, says he is a member of the firm of Hewlett & Lee, agents in New York of the Canadian Sugar Refining Company, Limited, the petitioner herein, and that he is authorized to make this verification on its behalf. He has read the foregoing petition and knows the contents thereof, and the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and record of the cause in the District Court of the United States and in the United States Circuit Court of Appeals.

Deponent further says that the Canada Sugar Refining Company, Limited, is a foreign corporation, and none of its officers reside within the United States, but on the contrary, reside in the Dominion of Canada, where they now are.

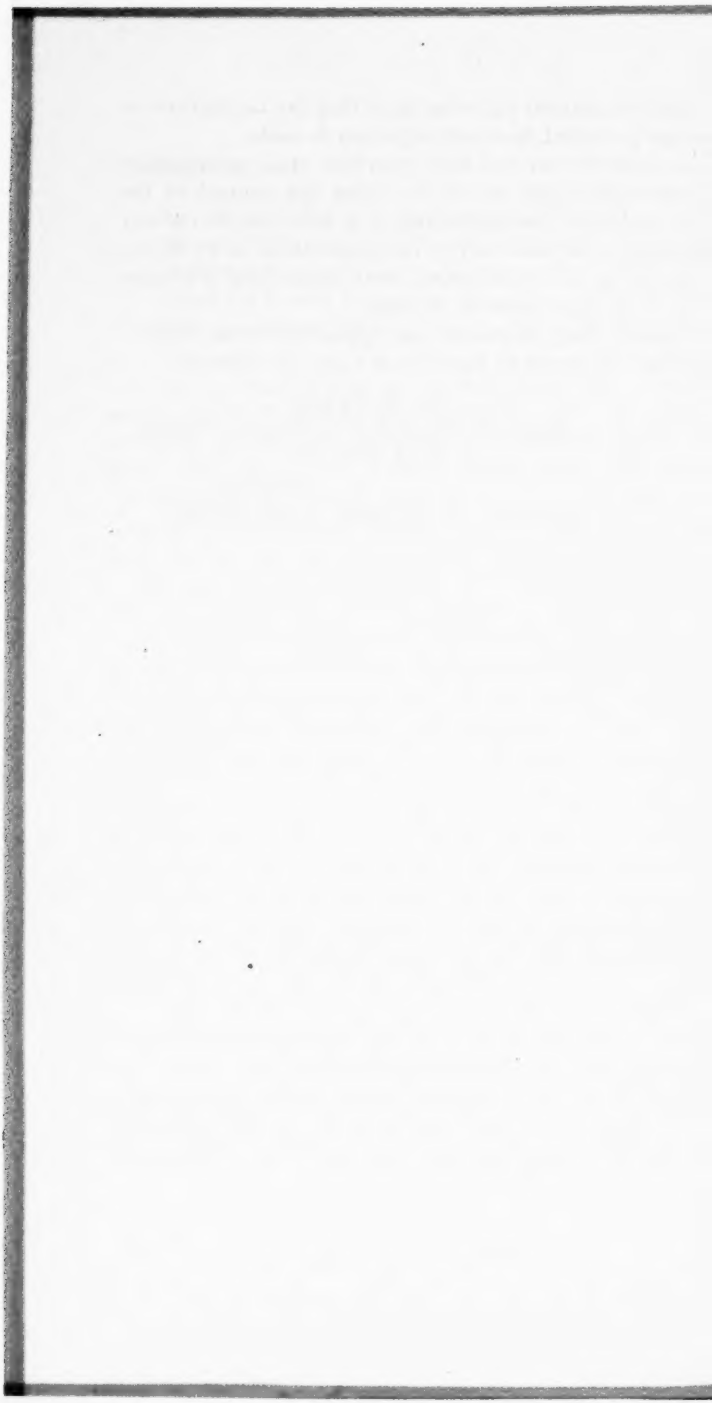
GEORGE HEWLETT.

Sworn to before me this 27th day of April, 1898.

CHARLES FLYNN,
[SEAL.] Notary Public,
New York County.

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion the petition is well founded, and is one upon which the prayer of the petitioner should be granted.

WILHELMUS MYNDERSE.



No. 1057, 290.

Brief of Mynderse for C

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Filed May 2, 1898.

Supreme Court of the United States.

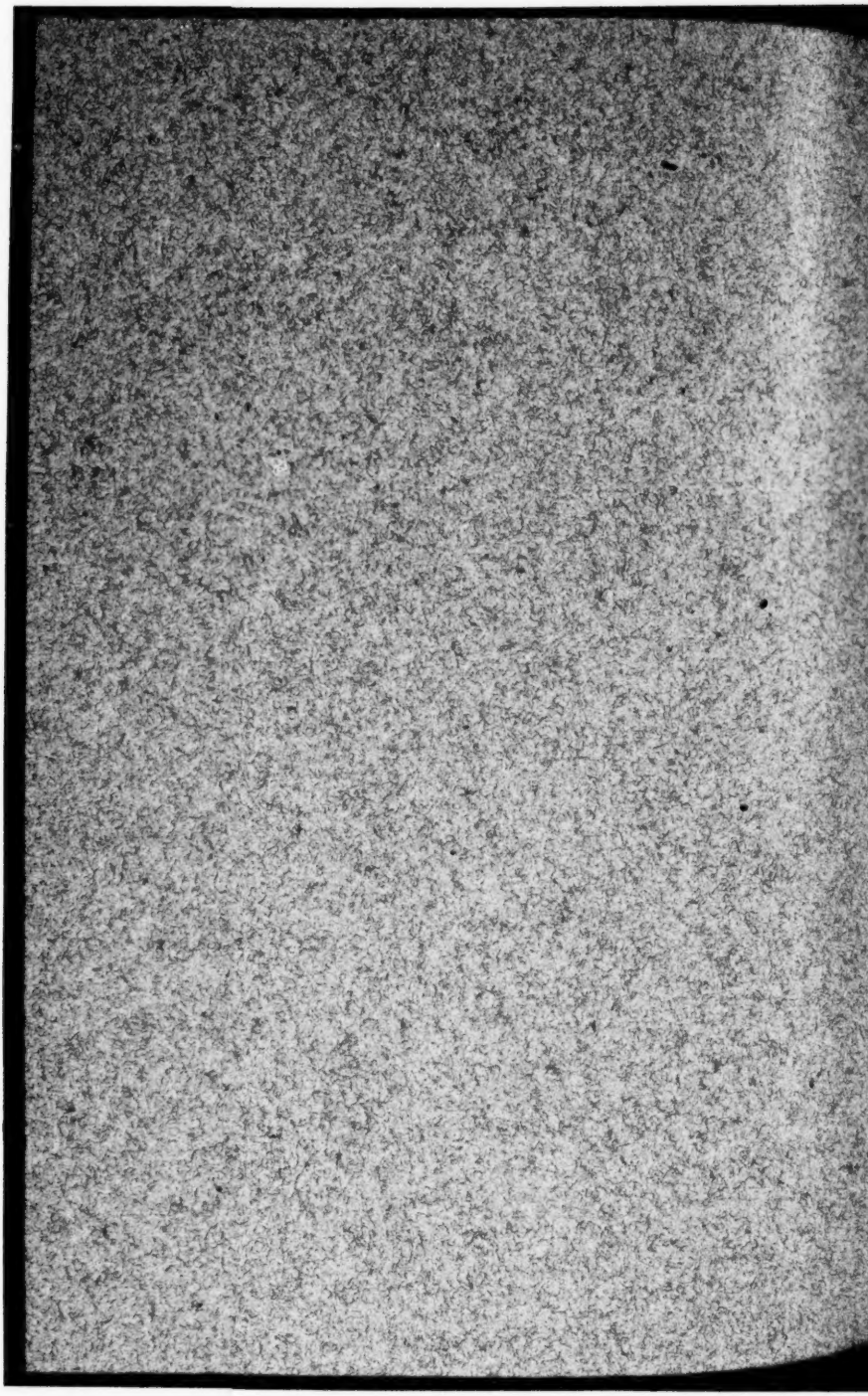
THE CANADA SUGAR REFINING COMPANY (LIMITED),
Libellant and Petitioner,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Brief in Support of Libellant's Petition for Writ of Certiorari.

WILHELMUS MYNDERSE,
Advocate.



Supreme Court of the United States.

CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN SUPPORT OF THE PETITION OF LIBELLANT FOR A WRIT OF CERTIORARI.

This action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellant, the Canada Sugar Refining Company, against the respondent, the Insurance Company of North America, to recover insurance effected by the libellant with the respondent in the amount of $15,000 "on "profits on a cargo of sugar against total loss only, valued "at sum insured, shipped on board the British ship *John* "*E. Sayre*, at and from Iloilo to Montreal."

Statement of Facts.

The libellant is a Canadian corporation, and has a factory for the refining of sugar, in Montreal, Canada.

The respondent is a Pennsylvania corporation, engaged in the business of marine insurance.

The libellant claims from the respondent $15,000, with interest, as a total loss under a certificate of insurance issued by the respondent "on profits on cargo of sugar" shipped on board the *John E. Sayre* at Iloilo to Montreal.

In the latter part of December, 1892, the libellant purchased by cablegram from Kerr & Company of Iloilo a cargo of sugar to be shipped on the *John E. Sayre* of "usual assortment" at an agreed price per ton. It was to be paid for by a credit granted by the Bank of Montreal (*Drummond, fols.* 84, 85, 94-96). The quantity purchased was to depend upon the amount the ship would carry.

This quantity being at the time unknown, the libellant applied to the Atlantic Mutual Insurance Company on December 9, 1892, for insurance on the shipment at the rate of $6.50 for each pound sterling of invoice value (*Drummond, fols.* 88, 89). This valuation of the pound sterling at $6.50 is a common rate for insurance purposes, and is intended to protect the insured not merely in respect of invoice cost, but also in respect of the cost of credit, cost of insurance and interest until arrival (*Drummond, fol.* 89).

The Atlantic Mutual accepted the application subject to a stipulation that the total insurance should not exceed $185,000, the limitation being due to the fact that the capacity of the ship was not known (*Drummond, fol.* 87).

Iloilo sugars are in three grades, No. 1, or A, being the most valuable, No. 2, or B, being next, and No. 3, or C, the lowest in value. They are sold in the market under a description of "usual assortment," which means that the shipment shall be made up one-eighth of No. 1, or A, two-eighths of No. 2, or B, and five-eighths of No. 3 or C. The price is an average price for the whole shipment based upon such assortment (*Drummond, fols.* 95-96).

The sugars were loaded at Iloilo on the *John E. Sayre* in January and February, 1893, and the shipment, when completed, was made up of 73,089 mats, weighing 39,360 piculs, or 2,460 tons (*Bills of Lading, Exhs. A, B, C, fols.* 373-384; *Invoices, Exhs.* 1, 2, 3, *fols.* 233-244).

There were 9,561 mats of No. 1 sugar, 17,614 mats of No. 2, and 45,914 mats of No. 3, thus assuring substan-

tially the " usual assortment " (*Bills of Lading, Exs. A, B, C, fols.* 373–384; *Invoices, fols.* 233–244). The invoice value was £22,152 13s. 8d. *Invoices, Exs., fols.* 233–244).

The *John E. Sayre* sailed from Iloilo, February 10, 1893, bound to Montreal (*Rouse, fol.* 129).

By the bills of lading the sugars were consigned to the order of the Bank of Montreal, and were taken up by the libellant from the Bank of Montreal on paying the credit through which the sugars had been purchased (*Drummond, fol.* 86).

While the sugars were at sea there was a decided increase in market values, and the libellant accordingly applied to the Atlantic Mutual on March 30th for additional insurance. This was granted by increasing the valuation of the pound sterling from $6.50 to $7.50 (*Drummond, fol.* 90). This arrangement was finally evidenced by the Atlantic Mutual issuing a policy upon the sugars to the libellant in the latter part of April, by which time the quantity and invoice value of the shipment was known, in the amount of $166,145, being at the rate of $7.50 for each pound sterling of the invoice value (*Drummond, fol.* 92). The policy bore date December 10, 1892, which was the date of the original application for insurance (*Policy, p.* 66).

The increased amount of insurance proving still insufficient to cover the sugars at the existing market valuations, the libellant effected other insurance with the respondent, upon its profits, in the valued sum of $15,000 (*Drummond, fols.* 91–94).

This insurance was made April 29, 1893, and at the time of making it Mr. Drummond informed the respondent that the Atlantic Mutual had issued a policy of $166,145 on the sugars (*Court Minutes of Trial, Record, fol.* 79).

The insurance certificate issued by the respondent reads:

" Insurance Company of North America, Philadelphia.

" This is to certify that on the 29th of April, 1893, this " Company issued under policy No. 117,407, made for " Robert Hampson fifteen thousand dollars on profits on

" cargo sugar. Against total loss only. Valued at sum " insured. Shipped on board of the British ship *John E.* " *Sayre* at and from Iloilo to Montreal. And the loss, if " any, subject to the terms and conditions of the policy, " has been made payable to the order of Canada Sugar " Refining Company, Limited, on surrender of this certi- " ficate " (*Exh., fols.* 245-247).

This certificate was signed by the Vice-President and by the Secretary of the respondent, and was countersigned by the Montreal agent, Robert Hampson, under whose open agency policy the certificate was issued.

On July 4th, while prosecuting her voyage, the *John E. Sayre* encountered heavy fog, and two days later, during the continued prevalence of the fog, stranded on the coast of Newfoundland, a little east of Port au Basque harbor, the nearest settlement being Channel (*Rouse, fols.* 131, 132; *Pike, 10th Int., fol.* 202).

The shore was rocky and the coast was dotted with " terrible reefs," upon which the ship ran at high tide (*Rouse, fols.* 132, 133).

The position of the vessel was one of danger, and the crew abandoned her (*Rouse, fol.* 138). The master alone remained on board with salvors who came to his assistance, fishermen of the neighborhood (*Rouse, fol.* 139).

There was no possibility of saving the vessel, but the master agreed with the salvors to save such cargo as they could. The agreement was that " they were to get half " of what they saved " (*Rouse, fols.* 136-138), which appears subsequently to have been modified as to a small portion of the cargo to an agreed compensation of one cent a pound (*Pike, fols.* 204, 205).

There was a heavy surf running, and the work had to be done in small boats. The fishing boats could not approach within a mile (*Rouse, fol.* 138). Water soon flooded the lower hold, destroying the cargo there. The salvors were able to save from the between-decks about three hundred tons of sugar, some of which was considerably damaged (*Rouse, fol.* 139; *Pike, fol.* 204; *Exhs.* 18, 19, *fols.* 423, 428; *Harvey, Exhs.* 15, 16, *pp.* 110, 111).

The saving of the cargo continued until some time on

the 8th of July, when work was finally abandoned (*Pike, fol.* 202). The ship became a total loss, her wreck being sold for $170 (*Rouse, fol.* 149).

On the evening of July 8th Mr. Pike, representing Harvey & Co., of Newfoundland, agents of the Atlantic Mutual Insurance Company, arrived in Channel in the interests of that company (*Pike*, fol. 202). He found that a portion of the saved sugar was in store, and the remaining portion was still on the fishing boats. He at once took charge of the situation and relieved the master of the vessel from further responsibility. He paid to him $200 in cash previously disbursed by him, and under instructions from the owner, the master turned the cargo over to Mr. Pike and left it in his charge (*Rouse, fols.* 141-145, 153-156; *Pike, 6th, 7th, 8th Ints., fols.* 206, 213, 215).

Mr. Pike, in the course of the following days, adjusted the claims of the salvors. He observed the agreement which had been made with them by the master of the *John E. Sayre*, which was as to the greater portion of the cargo that they should receive "half of what they saved." The portion thus affected weighed net 319 tons 3 cwt. 0 qr. 14 lbs.; and of this there was accordingly apportioned and set off to the salvors 159 tons 11 cwt. 2 qrs. and 7 lbs. (*Pike, fols.* 206-211; *Exh.* 2, *fols.* 437-440; *Harvey, Exh.* 15, *fols.* 405-408). Nearly all of the sugars thus given to the salvors were subsequently purchased from them by Mr. Pike for the Atlantic Mutual, at prices ranging from one half of a cent to two and a half cents per pound, according to condition, about 350 bags being wet. One salvor, however, preferred to retain a small part of his share in kind (*Harvey, Exh.* 15, *fols.* 405-408). The amount of money paid on such purchases aggregated $8,077.51 (*Pike, fols.* 437-440).

The portion saved under the agreement for payment at the rate of one cent a pound was found by Mr. Pike to weigh only 15 tons 9 cwt. 1 qr. and 13 lbs., in respect to which he paid the salvors $346.39. This cargo was all "more or less damaged in the boats" (*Pike, Exh.* 3, *fol.* 441; *Harvey, Exh.* 16, *fol* 409).

The Atlantic Mutual paid to the shipowner his ocean

freight and took over the possession of the cargo (*Rouse, fol.* 148; *Drummond, fols.* 108, 109).

Mr. Pike, after adjusting accounts with the salvors and purchasing their shares of the sugar, reconditioned portions of it, procuring 200 new bags, and then shipped it to Montreal on the coasting steamer *Tiber* (*Harvey, fols.* 181, 182; *Pike, fol.* 203). The shipment was made in the name of Harvey & Co. as shippers, and the sugar was consigned at Montreal to the "Atlantic Mutual Insurance Company" (*Harvey, fols.* 181, 182; *Bills of Lading, Exhs.* 17, 18, 19, *pp.* 104–108; *Pike, fols.* 219, 227, 228; *Drummond, fols.* 104, 111, 115).

These bills of lading covered 9,179 sacks of dry sugar and 845 sacks of wet sugar. The weight of the dry sugar was 307 tons 14 cwt. 1 qr. The weight of the wet sugar was 26 tons, 8 cwt. no qrs. 18 lbs. (*Bills of Lading, Exhs.* 17, 18, 19, *pp.* 104–108).

The total expenses incurred by the Atlantic Mutual Insurance Company in Newfoundland, through Harvey & Co., in respect of the salvage and of the care, reconditioning and forwarding of the sugars, amounted to $10,167.64 (*Harvey, fols.* 178, 179; *Exh.* 16 A., *fols.* 413–416).

The libellant had nothing to do with the handling of the sugars in Newfoundland, nor with the negotiations with the master of the vessel respecting surrender of the sugars there, and was not consulted in any way in those transactions (*Drummond, fols.* 104, 111, 115; *Harvey, fol.* 194; *Pike, fol.* 230).

Upon arrival of the sugars in Montreal the Atlantic Mutual sent an agent, Mr. Darragh, to receive them. He entered into negotiations with the libellant with the view of their taking delivery of the sugars, and with the result that the libellant finally accepted them "on a settlement" at approximately the insured value" (*Drummond, fol.* 105).

The bills of lading under which the sugars had been shipped on the *Tiber* were endorsed by "The Atlantic Mu-"tual Insurance Company per A. A. Raven, Second "Vice-President" (*Bills of Lading, Exhs.* 17, 18, 19, *fols.* 420, 426, 430), and with these in his hands Mr. Darragh

secured delivery of the sugars from the *Tiber* and turned them over to the libellant (*Drummond, fols.* 104, 105).

On the settlement between the libellant and the Atlantic Mutual the libellant paid the *Tiber's* freight of $4 a ton, and allowed to the Atlantic Mutual the difference between that freight and the freight paid by the Atlantic Mutual to the *John E. Sayre* (*Drummond, fols.* 110, 111).

In taking over the sugars no attempt was made to ascertain how far the original "assortment" had been disturbed; it being impracticable to determine that fact, and no attempt was made to measure accurately the damage that had come through the wetting of the sugar (*Drummond, fol.* 107). They were taken over in their existing grades, condition and quality at substantially the value insured in the Atlantic, there being no market value for raw sugars in Montreal, as being a "fairly equitable basis" (*Drummond, fols.* 105–107).

The libellant had learned through the newspapers, on July 7th, of the stranding of the *John E. Sayre*, and reported the fact by telegraph at once to the Atlantic Mutual (*Drummond, fol.* 98), who, on the same day, wrote to the libellant acknowledging receipt of the information, and saying they had previously received word through other channels, and had put the matter in the hands of Harvey & Co. of St. Johns, Newfoundland (*Drummond, fol.* 100; *Exh.* 5, *fols.* 249, 250).

Under date of July 10th the Atlantic Mutual wrote to the libellant:

"Our latest information is that all the sugar between-
"decks has been saved, and we hope to arrange to have
"it sent to Montreal" (*Exh.* 6, *fols.* 251, 252).

On July 14th the libellant learned of sugars being offered for sale in Montreal, and telegraphed to the Atlantic Mutual as follows:

"Sugar supposed *ex John E. Sayre* being offered here
"by brokers representing Newfoundland parties" (*Drummond, fol.* 102).

They confirmed the telegram by a letter of the same date in which they wrote:

"We have within the last day or two been repeatedly "asked to offer for sugar by Newfoundland parties.
"To-day an inquiry was received for our best price for "about 200 tons Iloilo sugar *ex John E. Sayre* from Archi- "bald & Co., North Sydney.
"We gave no answer to these persons, but advise you "by telegram that your local agent in North Sydney may "protect your interest" (*Exh.* 6, *fols.* 253, 254).

In acknowledging receipt of the telegram the Atlantic Mutual wrote:

"The master of the vessel agreed with salvors to give "them one-half of the sugar saved as salvage, and our "correspondents at St. Johns offered to purchase their "half and forward the whole to Montreal. It is quite "likely that the salvors, not satisfied with the offer made "to them, are endeavoring to ascertain whether more "money cannot be made by selling their share of the "sugar in Montreal" (*Exh. No.* 8, *fols.* 257, 258).

During the progress of these events the libellant gave to Mr. Hampson, the Montreal agent of the respondent, all the information it had. The position of the vessel and the cargo was discussed with him by Mr. Drummond upon the information then in Mr. Drummond's possession, and everything that became known to the libellant was communicated from time to time to this agent (*Drummond, fol.* 113).

Upon these facts the libellant claimed a total loss from the Insurance Company of North America under the insurance of profits. Upon the claim being questioned, formal proofs of loss were served August 23, 1894 (*Ex.* 10, *pp.* 67–87).
The considerable delay was due to the long consideration given to the claim by the respondent before finally rejecting it (*Art.* 8, *Proofs of Loss, Ex.* 10, *fols.* 285–287).

The libellants filed their libel on the 27th of November, 1894, in the District Court of the United States for the

Southern District of New York, and the cause was tried in December, 1896, before Hon. Addison Brown, District Judge.

He rendered a decision June 15, 1897, in favor of the libellant, and upon that decision a final decree was entered June 15, 1897, for the amount of the insurance, with interest and costs, aggregating $18,056.45 (*Record, fols.* 3, 4).

The Insurance Company then appealed to the United States Circuit Court of Appeals, where the cause came on for argument in March, 1898.

An opinion was filed in the United States Circuit Court of Appeals April 19, 1898, directing the decree of the District Court to be reversed, with costs, and that a mandate issue to the District Court to dismiss the libel (*fols.* 477–501).

Upon that decision a formal order has been entered for the issuance of a mandate (*fols.* 503–506).

A petition for a writ of *certiorari* was duly served upon the proctors for the respondent on the 27th day of April, 1898, and was filed in this court April 28th.

POINTS.

First.

THE ONLY PROFITS TO BE CONSIDERED ARE THOSE IN EXCESS OF THE VALUE OF $166,145 INSURED BY THE ATLANTIC MUTUAL INSURANCE COMPANY UPON THE CARGO.

When the respondent issued its certificate of insurance on profits, the existing value of the cargo was "about $181,000." This is alleged in the libel (*Libel, Art.* 5, *fol.* 10), and the respondent in its answer admits that "at the "time of such insurance the value of the said sugar, ex-

"clusive of freight, was about $181,000" (*Ans.*, *Art.* 4, *fol.* 62).

At the time of making insurance with the respondent, Mr. Drummond, the president of the libellant, informed the respondent's agent that the sugar itself was insured in the amount of $166 145 in the Atlantic Mutual (*Court Minutes of Trial, December* 7, 1896; *Record, fol.* 79).

The fact was therefore recognized at the time that the libellant's existing profits were about $15,000 in excess of the amount insured by the Atlantic Mutual, and the respondent thereupon issued its policy on such profits "valued at sum insured."

This circumstance may become material in two aspects:

A. If it becomes necessary to consider, in determining whether or not abandonment was essential, what profits, if any, survived the disaster, we shall need to have a true basis of original value for computing such profits. Such basis, so far as the respondent is concerned, is $166,145, the value insured on the cargo by the Atlantic Mutual. The profits over and above that amount are what were insured by the respondent. It does not concern them when or how or at what price the libellant first acquired the sugars. The price paid by the libellant to Kerr & Company, as represented by the invoices, is no more material to the respondent than would be the cost of raising the sugar if the libellant had raised it on his own plantation.

When the respondent issued the certificate of insurance the two interests of the libellant were defined—one at $15,000 as libellant's profits in the sugar, and the other at $166,145, representing its principal value.

B. If the question arises as to whether there was a loss of profits through the disaster. This is scarcely a possible contingency, inasmuch as the profits were valued in the policy or certificate.

Second.

THERE WAS AN ABSOLUTE AND ACTUAL TOTAL LOSS OF PROFITS, IN RESPECT TO WHICH THE LIBELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT INSURED.

It is important to note the phraseology of the certificate of insurance. It is for

"$15,000 on profits on cargo sugar. Against total loss "only" (*Cert. of Ins., Exh.* 4, *fols.* 245, 246).

These words are not ambiguous, and the only natural construction is that the insurance is made against the total loss of profits. Whether this was wise insurance or not for the respondent to make is another question. But it has assumed its risks and should have contemplated, before issuing the certificate, just what it was insuring.

The responsibility of the respondent is not conditioned upon a total loss of cargo, but upon a total loss of profits.

While insuring against "total loss" renders the insurer liable for a "constructive total loss," the question will for the present be treated as though such insurance protected the insured only in respect to an "absolute total loss" or "actual total loss."

From every point of view there was an actual or absolute total loss of profits.

A. The original cost of the shipment was £22,152 13s. 3d. (*Drummond, fol.* 85, *Exhs.* 1, 2, 3, *pp.* 59, 60, 61), or about $110,000. The value of the sugars which reached Montreal was "about $20,000" (*Libel, Art.* 7, *fol.* 18; *Ans., Art.* 6, *fol.* 67). This was their gross value on arrival in Montreal, without deductions for the extraordinary expenditures made for salvage, storage and forwarding, aggregating $11,500 (*Harvey, Exh.* 16*a*, *fols.* 413–415), or for the ocean freight paid by the Atlantic Mutual to the owners of the *John E. Sayre*, the amount of which is not exactly known (*Rouse, fol.* 148).

Not only were there no profits, but there was an enormous loss.

B. If the proceeds of the voyage are compared with the value of $166,145, designated as the value at the time the respondent's insurance on profits was made, the disappearance of profits is still more conspicuous.

C. Treating the arrived portion of the cargo by itself, the same result is reached—the total disappearance of profits, either on the basis of the invoice value of the cargo or on the basis of the insured value of the cargo.

The amount of cargo that reached Montreal was about 325 tons net (*Libel, Art.* 7, *fol.* 16; *Ans., Art.* 6, *fol.* 67; *Drummond, fol.* 104; *Harvey, Exhs.* 17, 18, 19, *pp.* 104–108).

The shipment had originally weighed about 2,460 tons (*Rouse, fol.* 130); so that only about one-eighth of the cargo reached destination. Such remnant came to Montreal in a broken "assortment," and a considerable portion of it in a damaged condition (*Drummond, fol.* 105; *Harvey, Exhs.* 17, 18, 18, *pp.* 104–108; *Pike, fol.* 204). Its value in this condition, freight paid, was admittedly "about $20,000" (*Libel, Art.* 7, *fol.* 18; *Ans., Art.* 6, *fol.* 67), to preserve which value expenditures for salvage, storage and forwarding had been incurred in the amount of $11,500, leaving a net value (without consideration of ocean freight) of about $8,500.

Assuming that the libelant had no insurance on the cargo, it would have found the proceeds of the arrived cargo, after payment of ocean freight, only about $7,000.

The original value of these 325 tons, based upon the invoice value of £22,152 13s. 3d., was about $15,000; and based upon the insured value of $166,145, was about $22,000.

D.—If we look at the matter still more critically and consider each bag of sugar or each pound of sugar by itself, and treat the profit insured thereon as being a "mere excrescence" or "incident" to the cargo, it was absorbed and extinguished when Captain Rouse made his

agreement with the salvors that they should have half of what they saved.

The profits insured by the respondent were only about nine per cent. of the value of the cargo, being only $15,000, while the cargo was insured for $165,145. The salvage was fifty per cent. and under the particular form of Captain Rouse's agreement with the salvors, one-half of every bag, *one half of every pound of the cargo belonged to the salvors.* The agreement which he made with them was, in the first instance, that they were "to get half of what they saved" (*Rouse, fol.* 136; *Pike, fol.* 205). His agreement was carried out literally and fairly by the representative of the Atlantic Mutual. He caused the sugar to be weighed in the presence of the salvors and set off their half to them (*Pike, fols.* 208, 226; *Exh.* 2, *fols.* 437-440), and then later purchased "the portion of the salvors" at rates varying from one-half a cent to two and a half cents a pound, according to its condition (*Pike, fols.* 212, 213; *Exh.* 2, *fols.* 237-240; *Harvey, Exh.* 15, *fols.* 405-408).

A small portion of the sugar was saved under a somewhat different but more onerous contract with the salvors, the stipulated payment being one cent a pound. As all this portion of the cargo was wet (*Pike, Exh.* 3, *fol.* 441; *Harvey, Exh.* 16, *fol.* 409), the compensation of the salvors was heavier than under the original arrangement. The modification related only to the last fifteen tons that came from the wrecked vessel (*Pike, Exh.* 3, *fols.* 441-444).

The particular form of the agreement with the salvors is material in more aspects than one; and *the attention of the Court is therefore attracted to the circumstance that as each pound of sugar reached the Newfoundland shore an undivided one-half interest therein, or a still greater interest, belonged to the salvors.*

A recent English case was for £2,000 "on profit on "charter * * * warranted free from all average."

The plaintiffs chartered the steamer *Govino* for a lump sum of £3,900, and offered her for general cargo in the Persian Gulf. While in the course of loading, and before knowing just what their profits would be, they insured

them as above for £2,000. Upon completion of loading the freight under bills of lading aggregated £4,690, showing a profit to the charterers of £790. The vessel sailed for London, the port of destination, and while in the course of discharging her cargo there was collided with by another vessel and was sunk.

Thereby, a considerable portion of her cargo, consisting of dates, was ruined, and the freight, which would have been earned on delivery of the dates, was lost.

The result was that the freight actually collected in London was less than £3,900.

The Court held that the loss on profits was total, the returns from freight being insufficient to meet the charter hire. Judgment was given, therefore, for £790.

Asfar & Co. vs. *Blundell*, *Law Rep.*, 1 *Q. B.*, 1895–1896, *p.* 123.

This case fully sustains the libellant's contention that there was a total loss of profits in every sense of the word, actual as well as constructive, when the value of the outturn in Montreal (which in gross was only $20,000) did not equal the amount of the original invoice values, which were in fact about eight times the saved value.

Third.

THE LOSS OF THE CARGO AND THE EXPENSES INVOLVED IN FORWARDING THE SAVED PORTION TO MONTREAL ENTITLE THE LIBELLANT TO RECOVER AS FOR A TOTAL LOSS.

There are three well defined grades of insurance applicable to any subject of marine insurance, to wit, insurance against "partial loss," against "total loss," or against an "actual or absolute total loss."

Insurance which protects against partial loss gives to the assured the right to reimbursement in respect of any damage or detriment that may come to the injured property through marine perils.

Insurance against total loss entitles the insured to recover the entire insurance upon establishing a constructive total loss.

When insurance is made against actual or absolute total loss only, then the subject of insurance must be annihilated.

Insurance under the phrase "total loss" simply is satisfied by a constructive total loss with a seasonable abandonment.

Arnould on Marine Ins., 952.
McArthur on Marine Ins., 275.
Lowndes on Marine Ins., 132, 133.
Parsons on Maritime Law, Vol. II., 338-341.
Phillips on Ins., *Secs.* 1485, 1487.

If the underwriter desires to protect himself from liability for a constructive total loss, he makes his insurance to read "against actual total loss only."

Munroe vs. *B. & F. Marine Ins. Co.*, 52 *F. R.*, 777.
Burt vs. *Brewers & Malsters' Ins. Co.*, 78 *N. Y.*, 400.
Carr vs. *Security Ins. Co.*, 109 *N. Y.*, 504.

A "constructive total loss" of a cargo occurs when more than fifty per cent. of its value has been destroyed.

Phillips on Ins., *Sec.* 1608.
Parsons on Maritime Law, Vol. II., 371.

The cases cited by the counsel for the insurers do not sustain him.

In the case of *Burt* v. *The Brewers and Maltsters' Ins. Co.*, 78 *N. Y.*, 400, the insurance was specifically against "actual total loss" only, and of course no question of constructive total loss could arise thereunder.

In the case of *Chadsey* vs. *Guyon*, 97 *N. Y.*, 333, the cargo was warranted by the assured free from particular average. The subject of insurance was a shipment of potatoes in barrels, and the question considered by the Court was whether the insurance could be apportioned and made applicable to each barrel of potatoes, thus permitting the assured to recover in respect of a total loss of part.

In the case of *Humphrey* vs. *The Union Ins. Co.*, 3 *Mason*, 440, the subject of insurance was a cargo of lemons and oranges in boxes insured under the memorandum clause, free from particular average. The oranges were destroyed, while the lemons sustained comparatively slight damage, and the question was whether a recovery could be had for a total loss of part.

But to entitle the insured to recover his full insurance upon a constructive total loss, he must ordinarily make a timely abandonment to his underwriters. This is so in respect of insurance upon a vessel or of insurance upon cargo.

An abandonment, however, is not always necessary, nor even proper, in the case of insurance upon profits.

The latest English writer says:

" Notice of abandonment of profits may sometimes be " necessary. If there is no valid insurance on the goods " so that no abandonment could be made to the under- " writers on goods, a notice of abandonment should be " given in any case where it would be required with refer- " ence to the goods if the goods were insured. It is better " to give notice of abandonment in any case where the " goods are not totally destroyed."

Tyser on Mar. Ins. Losees, Sec. 109.

This is in accord with our own writers and our own decisions to the effect that an abandonment of profits is not necessary or proper when there is an insurance upon the goods themselves, for the reason that the insurer on goods has a right to a complete and absolute abandonment of the cargo with all of its increments and incidents.

" Profits are so far distant from cargo that if both are " insured it is said that there may be a several abandon- " ment of each. But it is not easy to see how anything " can pass by the abandonment of profits. For the in- " surers on goods take by the abandonment to them " everything on which profits have been made, or can be " made or saved."

Parsons on Maritime Law, Vol. II., 394.

" A policy upon expected profits does not seem to offer " anything upon which an abandonment can operate.

"And it does not appear from any speculation or any "judicial opinion relating to this subject which has come "to my knowledge that an abandonment of this interest "can be of any importance to the underwriters, other- "wise than as a notice that a total loss is claimed; and if "this is its only effect an abandonment is not necessary. "* * * It does not appear, therefore, that an abandon- "ment of profits can be anything more than a nugatory "ceremony."

Phillips on Insurance, Sec. 1503.

"But admitting that this is to be regarded as a valued "policy, it is said that the assured by abandoning the "cargo to its underwriters has put it out of the "power of the defendant to receive any salvage on "the profits, and that, therefore, he (the assured) "has no right to recover in this suit. This is a dilemma "which the defendant ought to have foreseen at the time "of his subscription; he must have supposed there was "a policy on the cargo which in case of disaster would "naturally be abandoned to those who had insured it. It "is idle to complain of what must have been clearly his "own understanding of the contract; nor is it reasonable "in him to expect that for the purpose of recovering on a "small policy on profits a merchant should, by not aban- "doning the cargo, forego his insurance on that sub- "ject."

Mumford vs. *Hallett*, 1 *Johnson's Rep.*, 433, 439.

In an earlier case the same court, in passing upon a claim against the insurer of profits, said:

"Whatever might have been the claim of the defend- "ant (the insurer on profits) on the insurers of the cargo "if an abandonment had been made to them (on which "our opinion is reserved), we think, as between him and "the owner, he had a right to pay the right cost of the "goods with all the charges and profits, according to valu- "ation, and on those terms to insist on an assignment. "To enable him to assert this right there ought to have "been a seasonable abandonment which, notwithstanding "the decision just referred to, should always be made as "soon as possible, where the disaster, as was the case "here, is of such nature as not to divest the assured of "property. This is a case of some novelty on which "precedents throw very little if any light. It is very "probable, therefore, that our view of it may be incorrect,

" but, after mature reflection we cannot come to any
" other result satisfactory to our own minds. If wrong,
" the precedent will not work much mischief, for it can-
" not be long before underwriters, in this State, at least,
" discover the folly of insuring, unless at a very advanced
" premium, either profits or freight."

Tom vs. *Smith*, 3 *Caines*, 245, 251.

As to the mere matter of form, therefore, it is apparent that the libellant is not prejudiced by the fact that an abandonment was not made to the respondent.

An abandonment, moreover, is not called for when the loss is total. The only function is to convert a constructive total loss into a total loss.

If the sugars were to be abandoned to any one they would need to be abandoned to the Atlantic Mutual Insurance Company. Such abandonment would take with them all profits in every form of increment and incident. There would be nothing left to abandon to the the respondent. The reasoning in the case of *Tom* vs. *Smith* shows that the only object of abandonment to the respondent would be to enable him to redeem the abandoned cargo from the Atlantic Mutual, paying to the Atlantic Mutual its loss, and paying to the libellant its insurance. Such a right would be absolutely barren, a right as valueless as the abandonment of a ship that has been annihilated by storms and sent to the bottom of the ocean, and in such situation no abandonment is necessary.

Fourth.

THERE WAS A VIRTUAL ABANDONMENT OF THE SUGARS BY THE LIBELLANT TO THE ATLANTIC MUTUAL INSURANCE COMPANY, AND AN ACCEPTANCE OF SUCH ABANDONMENT, BY WHICH THE SUGARS BECAME A CONSTRUCTIVE TOTAL LOSS TO THE LIBELLANT. AND WITH THE LOSS OF THE SUGARS, ALL PROFITS WERE LOST.

In determining the character of the transactions between the libellant and the Atlantic Mutual Insurance

Company, the respondent, so far as it is concerned, is not in position to raise hypercritical questions as to form.

The course of events indicates an abandonment by the libellant to the Atlantic Mutual and an acceptance of abandonment by that company. There are forms lacking which would have been supplied at any moment by the libellant if the insurer had indicated a disposition to question the abandonment.

But forms may be waived and some were waived in this case. But such circumstances did not render the abandonment of the cargo less effective, nor can advantage be taken of any omissions of form by the respondent. Even a defendant underwriter may be held responsible for a constructive total loss when there has been no formal abandonment, upon the ground either that he has waived an abandonment or that his actions indicated that the proceedings were sufficient to constitute an abandonment.

"If an abandonment is wanting in any formality the "insurer may waive all objection, and they do this by "calling for the proof and acting as if the abandonment "were altogether sufficient."

Parsons on Maritime Law, Vol. II., 398.

"In the United States the courts hold, that where the "nature of the transaction is such as to leave no reasona-"ble doubt of the intention of the insured to abandon, "and of that intention being understood by the under-"writer, it shall be implied that a proper offer of aban-"donment has been made, though no formal notice can "be proved to have been given."

Arnould on Mar. Ins., 958, 959.

"Mr. Justice STORY, speaking of abandonment and "notice of abandonment in the case where notice was re-"quired by the policy, but neither the form of notice nor "the abandonment was described, said: 'They may be in "'one or two instruments; they may be in direct terms "'or by fair and natural inferences; it matters not how "'they are given or executed.'"

Phillips on Ins., Sec. 1678.

What happened in this case?

On July 7th the libellant telegraphed to the Atlantic

Mutual that the *John E. Sayre* was reported ashore off the coast of Newfoundland (*Drummond*, 7, *fol.* 98). In acknowledging receipt of this notice the Atlantic Mutual announced that they had been previously advised of the disaster and had put the matter in the hands of Harvey & Co., their agents at St. Johns, Newfoundland (*Exh.* 5, *fols.* 249, 250).

The libellant took no part in the rescue of the sugar, was not asked to take part, and in fact was not expected to take part.

The Atlantic Mutual took entire control and on July 10th wrote to the libellant that sugar had been saved from the between-deck, and that they hoped "to arrange to have it "sent to Montreal" (*Exh.* 6, *fols.* 251, 252).

A few days later, July 14th, the libellant, learning that inquiries were being made in Montreal for a market for certain of the sugar, telegraphed to the Atlantic Mutual:

"Sugar supposed *ex John E. Sayre* being offered her "by brokers representing Newfoundland parties" (*Drummond, fol.* 102).

On the same day this telegram was confirmed by a letter in which the libellant wrote:

"We gave no answer to these persons, but advise you "by telegram that your local agent at North Sydney *may* "*protect your interests*" (*Exh.* 6 *X, fol.* 253).

To which the Atlantic Mutual replied on the same date:

"Have not authorized sale. Master of *Sayre* agreed to "give salvors one-half sugar. We have directed all for- "warded to Montreal, allowing one cent pound salvage" (*Exh.* 7, *fol.* 257).

In confirming this telegram the Atlantic Mutual wrote, setting forth the agreement made between the master and the salvors, and stating that they were in treaty to purchase the salvors' half of the salved sugar.

This is all that passed between the libellant and the Atlantic Mutual until the saved fragments of the shipment reached Montreal in August.

What had happened in Newfoundland?

The agent of the Atlantic Mutual had appeared at the scene of the wreck, had displaced the master of the *John E. Sayre*, had paid the ocean freight upon the sugars to the owners of the vessel (*Rouse, fol.* 148; *Drummond. fols.* 108-109), and had taken entire control of the cargo, The master testifies:

" Mr. Pike took charge of the cargo, and of course I had " paid some two or three hundred dollars expenses in " landing and storing it, which he paid me back; or two " hundred of it he paid me back. Well, that was all I " knew about the cargo. I was done with it then.

" Q. You left it then in his hands? A. I left it in his " hands " (*Rouse, fols.* 143, 144).

And under cross-examination he says:

" Q. When did you cease to have to do with the cargo, " captain? A. Well, when I was paid this $200 on ac- " count and instructed to give up the cargo by my owner.

" Q. That was about when? A. Well, I couldn't tell " you the date; it was one or two days or perhaps three " days after the ship was stranded, but the date I don't " just remember " (*Rouse, fol.* 149).

The Atlantic Mutual's agents then weighed the sugar in the presence of the salvors, set off to the salvors the half that belonged to them, and subsequently purchased such half (*Pike, fols.* 226, 213; *Exhs.* 2, 3, *pp.* 110, 111).

The Atlantic Mutual were then in supreme control of the salved sugar. The master and owners of the *John E. Sayre* had been paid off and had left the scene (*Rouse, fols.* 141-148; *Harvey, fols.* 174, 175, 182, 183, 187, 190, 192; *Pike, fols.* 206, 207, 212, 213, 218, 219, 220, 222).

To be sure they had undisturbed possession at that time of only one-sixteenth of the original cargo, the title to the remaining portion of the salved cargo being vested in the salvors. They, however, purchased the salvors' portion, and by purchase, *and by purchase only*, acquired title to another sixteenth. The sugar was then shipped to Montreal under a new contract of transportation. The original voyage had been broken up, and the contract between the shippers and the shipowner abandoned.

The new shipment was made in the name of Harvey & Co., they being the agents of the Atlantic Mutual Insurance Company, upon the coasting steamer *Tiber*, for delivery at Montreal, "to the Atlantic Mutual Insurance Company of New York" (*Harvey, Exhs.* 17, 18, 19, *fols.* 419, 424, 429).

Here was a complete assumption and declaration of ownership by the Atlantic Mutual.

Mr. Drummond has testified to what occurred when the sugar arrived in Montreal.

"When it arrived the Atlantic Mutual sent a represen-
"tative (Mr. Darragh) to Montreal, who received it, and
"subsequently handed it over to us on a settlement.

"Q. From Mr. Darragh? A. Yes.

"Q. On what basis of value did you receive that sugar
"from Mr. Darragh, do you remember? A. I am not
"very sure; I think we took it approximately at its in-
"sured value, if I remember rightly.

"Q. Was any examination made by you of the grades
"of the sugar which arrived as to whether it was one,
"two and three, or not? A. Impossible to do that; we
"took it as an average.

"Q. It has been shown that certain of these bags of
"sugar were wet; was there any attempt made by you
"to adjust any item of loss in that respect accurately
"with Mr. Darragh? A. I don't think so" (*Drummond, fols.* 104-106).

"Q. What do you consider as to your legal rights in re-
"spect to this sugar, when it came to Montreal? A. Prac-
"tically the sugar was in the possession of the Atlantic
"Mutual Insurance Company; was their property; but as
"its coming to Montreal would have brought it to a place
"where practically there was no market for it, we were
"obliged or considered ourselves entitled to deal with it
"apart from any question of legal rights on an equitable
"basis. We consequently arrived at a settlement as
"nearly mutually satisfactory as we could.

"Q. When that sugar came there did you think it was
"yours or theirs? A. It was theirs" (*Drummond, fols.* 114, 116).

The bills of lading of the *Tiber* under which the sugar was delivered in Montreal bear the endorsement of the "Atlantic Mutual Insurance Company by A. A. Raven, "Second Vice-President" (*Exhs.* 17, 18, 19).

If the libellant had declined to handle the sugar when it came to Montreal, the situation was such that they could legally have insisted that an abandonment had been made and accepted, and they could have collected a total loss from the Atlantic Mutual.

Both parties recognized this, and accordingly an adjustment was made not upon surveys or upon any exact lines, but of a generally equitable character, by which, as the libellant alleges in its libel, it received the sugar "on account of and in part payment for the loss" (*Libel, Art. 7, fol. 17*).

Certainly the respondent, who was not in any event entitled to an abandonment, has no right to question the position. The only right the libellant could possibly have had would be to intervene, pay the entire loss of the Atlantic Mutual, all the expenses of salvage and forwarding, a total loss under libellant's insurance upon profits, and take possession of the saved cargo.

Its only possible right, and this right is by no means admitted, therefore, was to pay losses and expenses aggregating over $190,000, and to acquire title to sugars worth "about $20,000."

Naturally the respondent had no desire to make such intervention, though its agent in Montreal received "from time to time" all the information which the libellant had as to the position of the vessel and cargo (*Drummond, fol. 114*).

Fifth.

ALL THE EQUITIES OF THE SITUATION ARE IN FAVOR OF THE LIBELLANT.

Not only has there been literally, in accordance with the terms of the certificate, a "total loss" of the profits, but there has been a total loss of the profits on every grain of the sugars, through perils insured against.

While a small portion of the sugars reached destination,

the circumstance was accomplished only by artificial measures and by extraordinary expenditures.

In respect of the sugars so delivered, the title to an undivided one-half had passed from the libellants to the salvors by virtue of Captain Rouse's agreement, and had passed from the salvors to the Atlantic Mutual by sale and purchase, and after being so vested in two strangers, came back to the libellant only by virtue of a "settlement" with the Atlantic Mutual (*Drummond, fol.* 105).

Instead of the value of $181,000, which is admitted to have existed upon the day the respondent wrote its insurance (*Libel, Art.* 5, *fol.* 10; *Ans., Art.* 4, *fol.* 62), there remained a net value in Montreal of not over $7,000, to which the Atlantic Mutual was entitled, and in respect of which it had in fact practically accepted an abandonment.

The respondent made insurance upon the "profits" of the cargo, the only limitation being "against total loss only."

There is a provision which is commonly inserted in policies upon profits, and which Mr. Phillips thinks is quite essential for the protection of the underwriter. He refers to it as follows:

> "It accordingly appears to be quite necessary, in such "a policy, to stipulate for a settlement of loss and claim "for return of premium, in the same manner as on the "goods, or to make some other agreement to avoid uncer-"tainty."
>
> *Phillips on Ins., Sec.* 1242.

This is practically accomplished by underwriters stamping the policy or certificate of insurance with these words or words equivalent thereto:

> "This company is liable only for the same proportion of "loss on profits that it would be under this policy, on the "merchandise from which the profits accrue and is entitled "to the same salvage."

The respondent did not so stamp its policy or certificate, and it is to be presumed that it received a due consideration in the way of premium for omitting such stamp.

It should have contemplated, and probably did contemplate, for it is an intelligent insurer, the responsibility imposed upon it by the insurance which it made.

It cannot claim exemption, after a loss occurs, which the contract of insurance does not give it.

Sixth.

THE UNITED STATES CIRCUIT COURT OF APPEALS HAVE ERRED IN HOLDING THAT THERE MUST BE AN ABSOLUTE AND ENTIRE LOSS OF CARGO IN ORDER TO EFFECT A TOTAL LOSS OF PROFITS.

There is no authoritative judicial decision in the United States distinguishing between a constructive total loss on cargo or vessel and a constructive total loss on profits.

The rule that a fifty per cent. loss affords sufficient foundation for a constructive total loss of either vessel or cargo is well established. There is no rule requiring a broader basis for a constructive total loss of profits.

The English rule, which is more onerous upon the assured than the American rule in the measure of a constructive total loss on vessel and cargo, admits a total loss of profits when, in ordinary parlance, the profits have been eaten up or consumed by a marine peril, even though the subject matter out of which the profits grew continues to exist. Thus, in a case where profits of the charter were insured "warranted free from all average," which is the equivalent to insurance against "total loss," the plaintiffs having chartered a steamer for a lump sum, took on a general cargo at freights aggregating several hundred pounds more than the charter hire, and insured the surplus as profits. A certain portion of the cargo, being damaged by marine perils, was ruined and the freight thereon lost. As a result the freights actually collected were less than the charter hire. It was held that there was a total loss of profits (*Asfar & Co.* vs. *Blundell, L. R.*, 1 *Q. B.*, 1895, 1896, p. 123).

The United States Circuit Court of Appeals hold in effect not only that such a rule is bad, but it holds that a constructive total loss of cargo does not carry with it a total loss of profits; and go further, and holds that *if any item of the cargo survives*, even in a damaged condition, there can be no total loss of profits.

There is some uncertainty among text writers as to what constitutes a total loss of profits, but no text writer has intimated any such rule as is laid down by the United States Circuit Court of Appeals.

Mr. Parsons argues that the necessity which rests upon the assured of transferring by abandonment to the underwriter on cargo the remnant of goods saved in order to constitute a constructive total loss, creates an inability on the part of the assured to make any abandonment to the underwriter on profits; and that, therefore, there can never be a constructive total loss of profits.

Parsons on Maritime Law, Vol. II., pp. 394, 395.

Mr. Phillips make a similar suggestion in his work.

Phillips on Insurance, Section 1503.

The intimations of these writers relate, however, to instances where some portion of the cargo has come through to destination undamaged and without extraordinary charges, so that there exists an *actual profit on such portions of the cargo*, which profit the assured is compelled to surrender to his underwriter on cargo in order to claim a total loss.

The United States Circuit Court of Appeals has failed to note the reservations of these writers, and has applied their intimations to the case at bar without observing that *there was no particle of profit attaching to any portion of* the remnant of sugars *that arrived* in Montreal. The profit had been consumed by the breaking up of the sugars, by the physical damage through wet, and by the expenses of salvage.

The only judicial decision in the United States upon the question, is that of Mr. Justice Kent in *Abbott* vs. *Sebor.*

This opinion is opposed to the views of the text writers above referred to, but was accepted in this case by the District Judge, as authoritative.

Mr. Justice Kent said:

> " What shall be the criterion of an average or a
> " total loss, in respect to profits, I cannot at
> " present with clearness decide. Perhaps the es-
> " tablished rule, in respect to ship and cargo, of a
> " loss of more or less than half the subject in value
> " may be applicable. If so, the question here will
> " be whether the more profitable half of the cargo
> " might not have been brought in the same ship to
> " New York. I suggest this as a rule that may,
> " perhaps, supply."
>
> *Abbott* vs. *Sebor*, 3 *Johnson's Cases*, 39, 46.

In the case at bar, less than one-eighth of the cargo reached destination. Suppose there had been no insurance on cargo, but only the profits over and above the value of $166,145. Suppose that the original sea carrier had forwarded this fragment of sugar through to destination, and delivered it—not from the original carrying vessel, but from a forwarding vessel—to the consignee. The delivery would have been burdened with salvage liens of fifty per cent., and liens for other expenses of fully fifteen per cent. The net value delivered to the consignee would be $7,000 against interest valued by the insurer of profits at $166,145. The $7,000 would not have represented sound sugar unencumbered with liens; it would represent merely an equity under the burden of salvage and kindred expenses.

It is upon this point of fact, undisputed fact, that the United States Circuit Court of Appeals have erred. They are at direct issue with the learned District Judge; they are at direct issue with the only other American authority; they are at direct issue with the English authorities. Their conclusion is based upon the error of assuming that the libellant received any portion of profits. They say, in their decision:

> " By the decree of the Court below, the libellant
> " has been awarded a recovery which, if collected,
> " would put into this object *the profits realized on*

> " *the cargo saved* in addition to the amount of the " respondents' policy. Irrespective of this consid- " eration, and *because it has received the profits on* " *a part of the cargo*, we are of the opinion that " there has not been a total loss of profits within " the meaning of the contract " (*Opinion, fol.* 501).

While the decision is in form double-headed, both heads depend for life upon the single incorrect proposition that the libellant has received profits on any portion of the cargo. This error is not based upon any dispute of facts, because there is not a single disputed fact in the whole record; but upon a pure misunderstanding of the situation.

The gross value of the sugars which reached Montreal was admittedly "about $20,000" (*Libel, fol.* 18; *Answer, fol.* 67). In taking them over from the Atlantic Insurance Company, the libellant allowed the Atlantic Insurance Company, $23,396.19—a valuation fixed, in view of the damaged condition and broken assortment of the sugars. It was a fair valuation, and equitably arrived at. It was certainly a full valuation.

The libellant received simple indemnity from the Atlantic Mutual Insurance Company, his loss being paid by sugars valued at $23,396.19, and cash $142,748.81, making a total of $166,145, the amount insured.

While this Court has never passed directly upon the point at issue in this action, it has held that insured profits are recoverable even though they are not tangibly earned and merely awaiting realization, as they were in the case at bar, but are mere expected profits. Thus, where a shipowner starting his vessel off as a trader upon a long round voyage insured the expected profits of the venture in the valued sum of $20,000, and the vessel was lost with her cargo before she passed the first stage of her voyage, a full recovery was permitted, without any proofs that profits would have been realized if she had not met disaster.

Patapsco Ins. Co. vs. *Coulter*, 3 *Peters*, 221.

In an early English case it was held that the breaking up of a voyage through the loss of a vessel, the cargo being entirely saved and reaching destination, constituted of itself a total loss of profits, the theory being that the merchant was entitled to a delivery at destination from the vessel in which the goods had been shipped.

Barclay vs. *Cousins*, 2 *East.*, 544.

Seventh.

IT IS RESPECTFULLY SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD ON THIS CASE.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for the Petitioner.

WILHELMUS MYNDERSE,
Advocate.

No. 149.

Supreme Court of the United States

October Term, 1894.

THE CANADA SUGAR REFINING COMPANY,

Libellant and Petitioner,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

Brief for Libellant and Petitioner

WILHELMUS KINDERSLEY,

Advocate.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY, LIMITED, *Libellant and Petitioner,*	
against	No. 290.
THE INSURANCE COMPANY OF NORTH AMERICA, *Respondent.*	October Term, 1898.

Brief for the Libellant and Petitioner.

This action comes on for hearing upon a writ of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit (*Record, p.* 82).

The action was originally instituted in the District Court of the United States for the Southern District of New York by the libellant, the Canada Sugar Refining Company, Limited, against the respondent, the Insurance Company of North America, to recover insurance effected by the libellant with the respondent in the amount of $15,000 "on profits on a cargo of sugar. Against total "loss only. Valued at sum insured. Shipped on board "the British ship *John E. Sayre*, at and from Iloilo to "Montreal."

The libellant filed its libel on the 27th of November, 1894, and the cause was tried in December, 1896, resulting in a decree in favor of the libellant against the respondent for the full amount of the insurance, with interest and costs (*Opinion, pp.* 73, 74; *Decree, p.* 75).

Upon an appeal taken by the respondent, the United States Circuit Court of Appeals directed that the decree of the District Court be reversed and the libel dismissed (*Opinion, pp.* 77–81), and entered an order accordingly April 23, 1898 (*Order, p.* 81).

Upon the petition of the libellant this Court on the 10th day of May, 1898, issued its writ of *certiorari* to the Judges of the United States Circuit Court of Appeals, under which writ the record and proceedings in the cause have been duly filed (*Writ of Error, p.* 82).

Statement of Facts.

The libellant is a Canadian corporation, and has a factory for the refining of sugar in Montreal, Canada.

The respondent is a Pennsylvania corporation, engaged in the business of marine insurance.

The libellant claims from the respondent $15,000, with interest, as a total loss under a certificate of insurance issued by the respondent "on profits on cargo of sugar" shipped on board the *John E. Sayre* at Iloilo to Montreal.

In the latter part of December, 1892, the libellant purchased by cablegram from Kerr & Company, of Iloilo, in the Philippine Islands, a cargo of sugar to be shipped on the *John E. Sayre*, of "usual assortment" at an agreed price per ton. The cargo was to be paid for by a credit granted by the Bank of Montreal (*Drummond, pp.* 12, 14). The quantity purchased was to depend upon the amount the ship could carry.

This quantity being at the time unknown, the libellant applied to the Atlantic Mutual Insurance Company on December 9, 1892, for insurance on the shipment at the rate of $6.50 for each pound sterling of invoice value (*Drummond, p.* 13). This valuation of the pound sterling at $6.50 is a common rate for insurance purposes, and is intended to protect the insured not merely in respect of invoice cost, but also in respect of the cost of credit, cost of insurance and interest until arrival (*Drummond, pp.* 13, 19).

The Atlantic Mutual accepted the application subject to a stipulation that the total insurance should not exceed

$185,000, the limitation being due to the fact that the capacity of the ship was not known (*Drummond, p.* 13).

Iloilo sugars are in three grades, No. 1, or A, being the most valuable, No. 2, or B, being next in value, and No. 3, or C, being the lowest in value. They are sold in the market under a description of "usual assortment," which means that the shipment shall be made up one-eighth of No. 1, or A, two-eighths of No. 2, or B, and five-eighths of No. 3 or C. The price is an average price for the whole shipment based upon such assortment (*Drummond, p.* 16).

The sugars were loaded at Iloilo on the *John E. Sayre* in January and February, 1893, and the shipment, when completed, was made up of 73,089 mats, weighing 39,360 piculs, or 2,460 tons (*Bills of Lading, Exhs. A, B, C, pp.* 46, 47; *Invoices, Exhs.* 1, 2, 3, *pp.* 38, 39).

There were 9,561 mats of No. 1 sugar, 17,614 mats of No. 2, and 45,914 mats of No. 3, thus assuring substantially the "usual assortment" (*Bills of Lading, Exhs. A, B, C, pp.* 46, 47; *Invoices, Exhs.* 1, 2, 3, *pp.* 38, 39). The invoice value was £22,152 13s. 8d. (*Invoices, Exhs., pp.* 38, 39).

The *John E. Sayre* sailed from Iloilo, February 10, 1893, bound to Montreal (*Rouse, p.* 20).

By the bills of lading the sugars were consigned to the order of the Bank of Montreal, and were taken up by the libellant from the Bank of Montreal on paying the credit through which the sugars had been purchased (*Drummond, p.* 13).

While the sugars were at sea there was a decided increase in market values; and the libellant accordingly applied to the Atlantic Mutual on March 30th for additional insurance. This was granted by increasing the valuation of the pound sterling from $6.50 to $7.50 (*Drummond, p.* 13). This arrangement was finally evidenced by the Atlantic Mutual issuing a policy upon the sugars to the libellant in the latter part of April, by which time the quantity and invoice value of the shipment was known, in the amount of $166,145, being at the rate of $7.50 for each pound sterling of the invoice value (*Drummond, pp.* 13, 14). The policy bore date December 10, 1892,

which was the date of the original application for insurance (*Policy, p.* 42).

The increased amount of insurance proving still insufficient to cover the sugars at the existing market valuations, the libellant effected other insurance with the respondent, upon its profits, in the valued sum of $15,000 (*Drummond, p.* 14).

This insurance was made April 29, 1893, and at the time of making it Mr. Drummond informed the respondent that the Atlantic Mutual had issued a policy of $166,145 on the sugars (*Court Minutes of Trial, Record, p.* 11).

The insurance certificate issued by the respondent reads:

"INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA.

"This is to certify that on the 29th of April, 1893, this "Company insured under policy No. 117,407, made for "Robert Hampson fifteen thousand dollars on profits on "cargo sugar. Against total loss only. Valued at sum "insured. Shipped on board of the British ship *John* "*E. Sayre* at and from Iloilo to Montreal. And the loss, "if any, subject to the terms and conditions of the "policy, has been made payable to the order of Canada "Sugar Refining Company, Limited, on surrender of this "certificate" (*Exh.* 4, *p.* 40).

This certificate was signed by the Vice President and by the Secretary of the respondent, and was countersigned by the Montreal agent, Robert Hampson, under whose open agency policy the certificate was issued.

On July 4th, while prosecuting her voyage, the *John E. Sayre* encountered heavy fog, and two days later, during the continued prevalence of the fog, stranded on the coast of Newfoundland, a little east of Port au Basque harbor, the nearest settlement being Channel (*Rouse, p.* 21; *Pike, 3d Int., p.* 33).

The shore was rocky and the coast was dotted with "terrible reefs," upon which the ship ran at high tide (*Rouse, p.* 21).

The position of the vessel was one of danger, and the crew abandoned her (*Rouse, pp.* 21, 22). The master

alone remained on board with salvors who came to his assistance, fishermen of the neighborhood (*Rouse, 5th Int.*, *p.* 33).

There was no possibility of saving the vessel, but the master agreed with the salvors to save such cargo as they could. The agreement was that " they were to get half of what they saved " (*Rouse, p.* 22) which appears subsequently to have been modified as to a small portion of the cargo to an agreed compensation of one cent a pound (*Pike 5th Int , p.* 33).

There was a heavy surf running, and the work had to be done in small boats. The fishing boats could not approach within a mile (*Rouse, p.* 22). Water soon flooded the lower hold, destroying the cargo there. The salvors were able to save from the between-decks about three hundred tons of sugar, some of which was considerably damaged (*Rouse, p.* 22; *Pike, p.* 33; *Exhs.* 18, 19, *pp.* 67, 68; *Harvey, Exhs.* 15, 16, *pp.* 64, 65).

The saving of the cargo continued until some time on the 8th of July, when work was finally abandoned (*Pike, p.* 33). The ship became a total loss, her wreck being sold for $170 (*Rouse, p.* 24).

On the evening of July 8th Mr. Pike, representing Harvey & Co., of Newfoundland, agents of the Atlantic Mutual Insurance Company, arrived in Channel in the interests of that company (*Pike, p.* 33). He found that a portion of the saved sugar was in store, and the remaining portion was still on the fishing boats. He at once took charge of the situation and relieved the master of the vessel from further responsibility. He paid to him $200 in cash previously disbursed by him, and under instructions from the owner, the master turned the cargo over to Mr. Pike and left it in his charge (*Rouse, pp.* 23, 25; *Pike, 6th, 7th, 8th Ints., pp.* 34, 35).

Mr. Pike, in the course of the following days, adjusted the claims of the salvors. He observed the agreement which had been made with them by the master of the *John E. Sayre*, which was as to the greater portion of the cargo that they should receive " half of what they saved." The portion thus affected weighed net 319 tons 3 cwt. 0 qr. 14 lbs.; and of this there was accordingly apportioned

and set off to the salvors 159 tons 11 cwt. 2 qrs. and 7 lbs. (*Pike, p.* 33; *Exh.* 2, *p.* 71; *Harvey, Exh.* 15, *p.* 64). Nearly all of the sugars thus given to the salvors were subsequently purchased from them by Mr. Pike for the Atlantic Mutual, at prices ranging from one-half of a cent to two and a half cents per pound, according to condition, about 350 bags being wet. One salvor, however, preferred to retain a small part of his share in kind (*Harvey, Exh.* 15, *p.* 65). The amount of money paid on such purchases aggregated $8,077.51 (*Harvey, Exh.* 15, *p.* 64).

The portion saved under the agreement for payment at the rate of one cent a pound was found by Mr. Pike to weigh only 15 tons 9 cwt. 1 qr. and 13 lbs., in respect to which he paid the salvors $346.39. This cargo was all "more or less damaged in the boats" (*Pike, Exh.* 3, *p.* 72; *Harvey, Exh.* 16, *p.* 65).

The Atlantic Mutual paid to the shipowner his ocean freight and took over the possession of the cargo (*Rouse, p.* 24; *Drummond, p.* 17).

Mr. Pike, after adjusting accounts with the salvors and purchasing their shares of the sugar, reconditioned portions of it, procuring 200 new bags, and then shipped it to Montreal on the coasting steamer *Tiber* (*Harvey*, 10*th Int.*, *p.* 36; *Pike*, 10*th Int.*, *p.* 36). The shipment was made in the name of Harvey & Co. as shippers, and the sugar was consigned at Montreal to the "Atlantic Mutual Insurance Company" (*Harvey*, 10*th Int.*, *p.* 30; *Bills of Lading, Exhs.* 17, 18, 19, *pp.* 66, 67, 68; *Pike*, 10*th Int.*, *p.* 36; 5*th Cross-Int.*, *p.* 37; *Drummond, pp.* 17, 19).

These bills of lading covered 9,179 sacks of dry sugar and 845 sacks of wet sugar. The weight of the dry sugar was 307 tons 14 cwt. 1 qr. The weight of the wet sugar waa 26 tons, 8 cwt. no qrs. 18 lbs. (*Bills of Lading, Exhs.* 17, 18, 19, *pp.* 66, 67, 68).

The total expenses incurred by the Atlantic Mutual Insurance Company in Newfoundland, through Harvey & Co., in respect of the salvage and of the care, reconditioning and forwarding of the sugars, amounted to $10,167.64 (*Harvey* 8*th Int.*, *p.* 29; *Exh.* 16*a*, *p.* 66). These figures do not include the ocean freight, nor the freight from Newfoundland to Montreal.

The libellant had nothing to do with the handling of the sugars in Newfoundland, nor with the negotiations with the master of the vessel respecting surrender of the sugars there, and was not consulted in any way in those transactions (*Drummond, pp.* 17, 19; *Harvey, 6th Cross Int., pp.* 31, 32; *Pike, 6th Cross-Int., pp.* 37, 38).

Upon arrival of the sugars in Montreal the Atlantic Mutual sent an agent, Mr. Darragh, to receive them. He entered into negotiations with the libellant with the view of their taking delivery of the sugars, and with the result that the libellant finally accepted them "on a settlement "at approximately the insured value" (*Drummond, pp.* 16, 17).

The bills of lading under which the sugars had been shipped on the *Tiber* were endorsed by "The Atlantic Mu- "tual Insurance Company per A. A. Raven, Second Vice- "President" (*Bills of Lading, Exhs.* 17, 18, 19, 66, 67, 68), and with these in his hands Mr. Darragh secured delivery of the sugars from the *Tiber* and turned them over to the libellant (*Drummond, pp.* 16, 17).

On the settlement between the libellant and the Atlantic Mutual the libellant paid the *Tiber's* freight of $4 a ton, and allowed to the Atlantic Mutual the difference between that freight and the freight paid by the Atlantic Mutual to the *John E. Sayre* (*Drummond, p.* 17).

In taking over the sugars no attempt was made to ascertain how far the original "assortment" had been disturbed, it being impracticable to determine that fact; and no attempt was made to measure accurately the damage that had come through the wetting of the sugars (*Drummond, p.* 16) They were taken over in their existing grades, condition and quality at substantially the value insured in the Atlantic as being a "fairly equitable basis," there being no market value for raw sugars in Montreal (*Drummond, pp.* 16, 18).

The libellant had learned through the newspapers, on July 7th, of the stranding of the *John E. Sayre*, and reported the fact by telegraph at once to the Atlantic Mutual (*Drummond, p.* 15), who, on the same day, wrote to the

libellant, acknowledging receipt of the information, and saying they had previously received word through other channels, and had put the matter in the hands of Harvey & Co., of St. Johns, Newfoundland (*Drummond, p.* 15; *Exh.* 5, *p.* 40).

Under date of July 10th the Atlantic Mutual wrote to the libellant:

"Our latest information is that all the sugar between-
" decks has been saved, and we hope to arrange to have it
" sent to Montreal" (*Exh.* 6, *p.* 41).

On July 14th the libellant learned of sugars being offered for sale in Montreal, and telegraphed to the Atlantic Mutual as follows:

"Sugar supposed *ex John E. Sayre* being offered here
" by brokers representing Newfoundland parties" (*Drummond, p.* 15).

It confirmed the telegram by a letter of the same date, in which it wrote:

" We have within the last day or two been repeatedly
" asked to offer for sugar by Newfoundland parties.
" To-day an inquiry was received for our best price for
" about 200 tons Iloilo sugar *ex John E. Sayre* from Archi-
" bald & Co., North Sydney.
" We gave no answer to these persons, but advise you
" by telegram that your local agent in North Sydney may
" protect your interests" (*Exh.* 6*x*, *p.* 41).

In acknowledging receipt of the telegram the Atlantic Mutual wrote:

" The master of the vessel agreed with salvors to give
" them one-half of the sugar saved as salvage, and our
" correspondents at St. Johns offered to purchase their
" half and forward the whole to Montreal. It is quite
" likely that the salvors, not satisfied with the offer made
" to them, are endeavoring to ascertain whether more
" money cannot be made by selling their share of the
" sugar in Montreal" (*Exh. No.* 8, *p.* 42).

During the progress of these events the libellant gave to Mr. Hampson, the Montreal agent of the respondent,

all the information it had. The position of the vessel and the cargo was discussed with him by Mr. Drummond upon the information then in Mr. Drummond's possession, and everything that became known to the libellant was communicated from time to time to this agent (*Drummond*, *p.* 18).

Upon these facts the libellant claimed a total loss from the Insurance Company of North America under the insurance of profits. Upon the claim being questioned, formal proofs of loss were served August 23, 1894 (*Ex.* 10, *pp.* 43-54).

The considerable delay was due to the long consideration given to the claim by the respondent before finally rejecting it (*Art.* 8, *Proofs of Loss*, *pp.* 45-46).

POINTS.

First.

THE ONLY PROFITS TO BE CONSIDERED ARE THOSE IN EXCESS OF THE VALUE OF $166,145 INSURED BY THE ATLANTIC MUTUAL INSURANCE COMPANY UPON THE CARGO.

When the respondent issued its certificate of insurance on profits, the existing value of the cargo was "about $181,000." This is alleged in the libel (*Libel*, *Art.* 5, p. 2), and the respondent in its answer admits that "at the "time of such insurance the value of the said sugar, ex- "clusive of freight, was about $181,000" (*Ans.*, *Art.* 4, *p.* 9).

At the time of making insurance with the respondent, Mr. Drummond, the president of the libellant, informed the respondent's agent that the sugar itself was insured in the amount of $166,145 in the Atlantic Mutual (*Court Minutes of Trial*, *December* 7, 1896; *Record*, *p.* 11).

The fact was therefore recognized at the time that the libellant's existing profits were about $15,000 in excess of

the amount insured by the Atlantic Mutual, and the respondent thereupon issued its policy on such profits "valued at sum insured."

This circumstance may become material in two aspects:

A. If it becomes necessary to consider, in determining whether or not abandonment was essential, what profits, if any, survived the disaster, we shall need to have a true basis of original value for computing such profits. Such basis, so far as the respondent is concerned, is $166,145, the value insured on the cargo by the Atlantic Mutual. The profits over and above that amount are what were insured by the respondent. It does not concern them when or how or at what price the libellant first acquired the sugars. The price paid by the libellant to Kerr & Company, as represented by the invoices, is no more material to the respondent than would be the cost of raising the sugar if the libellant had raised it on his own plantation.

When the respondent issued the certificate of insurance the two interests of the libellant were defined—one at $15,000 as libellant's profits in the sugar, and the other at $166,145, representing its principal value.

B. If the question arises as to whether there was a loss of profits through the disaster. This is scarcely a possible contingency, inasmuch as the profits were valued in the policy or certificate.

Second.

THERE WAS AN ABSOLUTE AND ACTUAL TOTAL LOSS OF PROFITS, IN RESPECT OF WHICH THE LIBELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT INSURED.

It is important to note the phraseology of the certificate of insurance. It is for

"$15,000 on profits on cargo sugar. Against total loss "only" (*Cert. of Ins., Exh.* 4, *p.* 40).

These words are not ambiguous, and the only natural construction is that the insurance is made against the total loss of *profits*. Whether this was wise insurance or not for the respondent to make is another question. But it has assumed its risks and should have contemplated, before issuing the certificate, just what it was insuring.

The responsibility of the respondent is not conditioned upon a total loss of cargo, but upon a total loss of profits.

While insuring against "total loss" renders the insurer liable for a "constructive total loss," the question will for the present be treated as though such insurance protected the insured only in respect to an "absolute total loss" or "actual total loss."

From every point of view there was an actual or absolute total loss of profits.

A.—The original prime cost of the shipment was £22,-152 13s. 3d, (*Drummond, p.* 12, *Exhs.* 1, 2, 3, *pp.* 38, 39), or about $110,000. The value of the sugars which reached Montreal was "about $20,000" (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10). This was their gross value on arrival in Montreal, without deductions for the extraordinary expenditures made for salvage, storage and forwarding, aggregating $11,500 (*Harvey, Exh.* 16*a*, *p.* 413–415), or for the ocean freight paid by the Atlantic Mutual to the owners of the *John E. Sayre*, the amount of which is not exactly known (*Rouse, p.* 24).

Not only were there no profits, but there was an enormous loss.

B. If the proceeds of the voyage are compared with the value of $166,145, designated as the basis of value at the time the respondent's insurance on profits was made, the disappearance of profits is still more conspicuous.

C. Treating the arrived portion of the cargo by itself, the same result is reached—the total disappearance of profits, either on the basis of the invoice value of the cargo or on the basis of the insured value of the cargo.

The amount of cargo that reached Montreal was about

325 tons net (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10; *Drummond, p.* 16; *Harvey, Exhs.* 17, 18, 19; *pp.*66, 67, 68).

The shipment had originally weighed about 2,460 tons (*Rouse, p.* 20); so that only about one-eighth of the cargo reached destination. Such remnant came to Montreal in a broken "assortment," and a considerable portion of it in a damaged condition (*Drummond, p.* 16; *Harvey, Exhs.* 17, 18, 19, *pp.* 66, 67, 68; *Pike, p.* 33). Its value in this condition, freight paid, was admittedly "about $20,000" (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10), to preserve which value expenditures for salvage, storage and forwarding had been incurred in the amount of $11,500, leaving a net value (without consideration of ocean freight) of about $8,500.

Assuming that the libellant had no insurance on the cargo, it would have found the proceeds of the arrived cargo, after payment of ocean freight, only about $7,000.

The original value of these 325 tons, based upon the invoice value of £22,152 13s. 3d., was about $15,000; and based upon the insured value of $166,145, was about $22,000.

D. If we look at the matter still more critically and consider each bag of sugar or each pound of sugar by itself, and treat the profit insured thereon as being a "mere excrescence" or "incident" to the cargo, it was absorbed and extinguished when Captain Rouse made his agreement with the salvors that they should have half of what they saved.

The profits insured by the respondent were only about nine per cent of the value of the cargo, being only $15,000, while the cargo was insured for $166,145. The salvage was fifty per cent. and under the particular form of Captain Rouse's agreement with the salvors, one-half of every bag, *one-half of every pound of the cargo belonged to the salvors.* The agreement which he made with them was, in the first instance, that they were "to get half of what they saved" (*Rouse, p.* 21; *Pike, p.* 23). His agreement was carried out literally and fairly by the representative of the Atlantic Mutual. He caused the sugar to

be weighed in the presence of the salvors and set off their half to them (*Pike, pp.* 33, 34; *Exh.* 2, *p.* 71), and then later purchased "the portion of the salvors" at rates varying from one-half a cent to two and a half cents a pound, according to its condition (*Pike, p.* 35; *Exh.* 2, *p.* 71; *Harvey, Exh.* 15, *p.* 64).

A small portion of the sugar was saved under a some what different but more onerous contract with the salvors, the stipulated payment being one cent a pound. As all this portion of the cargo was wet (*Pike, Exh.* 3, *p.* 72; *Harvey, Exh.* 16, *p.* 65), the compensation of the salvors was heavier than under the original arrangement. The modification related only to the last fifteen tons that came from the wrecked vessel (*Pike, Exh.* 3, *p.* 72).

The particular form of the agreement with the salvors is material in more aspects than one; and *the attention of the Court is therefore attracted to the circumstance that as each pound of sugar reached the Newfoundland shore an undivided one-half interest therein, or a still greater interest, belonged to the salvors.*

A recent English case was for £2,000 "on profit on "charter * * * warranted free from all average," which is the equivalent of insurance against actual total loss.

The plaintiffs chartered the steamer *Govino* for a lump sum of £3,900, and offered her for general cargo in the Persian Gulf. While in the course of loading, and before knowing just what their profits would be, they insured them as above for £2,000. Upon completion of loading the freight under bills of lading aggregated £4,690, showing a profit to the charterers of £790. The vessel sailed for London, the port of destination, and while in the course of discharging her cargo there was collided with by another vessel and was sunk.

Thereby, a considerable portion of her cargo consisting of dates was ruined, and the freight, which would have been earned on delivery of the dates, was lost.

The result was that the freight actually collected in London from the sound cargo was less than £3,900.

The Court held that the loss on profits was total, the

returns from freight being insufficient to meet the charter hire. Judgment was given, therefore, for £790.

Asfar & Co. vs. *Blundell, Law Rep.*, 1 *Q. B.*, 1895–1896, *p.* 123.

This case fully sustains the libellant's contention that there was a total loss of profits in every sense of the word, actual as well as constructive, when the value of the outturn in Montreal (which in gross was only $20,000) did not equal the amount of the original invoice values, which were in fact about eight times the saved value.

Third.

THE LOSS OF THE CARGO AND THE EXPENSES INVOLVED IN FORWARDING THE SAVED PORTION TO MONTREAL ENTITLE THE LIBELLANT TO RECOVER AS FOR A TOTAL LOSS.

There are three well defined grades of insurance applicable to any subject of marine insurance, to wit, insurance against "partial loss," against "total loss," and against "actual" or "absolute total loss."

Insurance which protects against partial loss gives to the assured the right to reimbursement in respect of any damage or detriment that may come to the injured property through marine perils.

Insurance against total loss entitles the insured to recover the entire insurance upon establishing a constructive total loss.

When insurance is made against actual or absolute total loss only, then the subject of insurance must be annihilated.

Insurance under the phrase "total loss" simply is satisfied by a constructive total loss with a seasonable abandonment.

Arnould on Marine Ins, 952.
McArthur on Marine Ins., 275.
Lowndes on Marine Ins., 132, 133.
Parsons on Maritime Law, Vol. II., 338-341.
Phillips on Ins., Secs. 1485, 1487.

If the underwriter desires to protect himself from liability for a constructive total loss, he makes his insurance to read "against actual total loss only," or "free from all average."

Monroe vs. *B. & F. Marine Ins. Co.*, 51 *F. R.*, 777.
Burt vs. *Brewers & Malsters' Ins. Co.*, 52 *N. Y.*, 400.
Carr vs. *Security Ins. Co.*, 109 *N. Y.*, 504.

A "constructive total loss" of a vessel or cargo occurs when more than fifty per cent. of its value has been destroyed.

Phillips on Ins., *Sec.* 1608.
Parsons on Maritime Law, *Vol. II.*, 371.
Heebner vs. *Eagle Ins. Co.*, 10 *Gray*, 131.
Green vs. *Pacific Ins. Co.*, 9 *Allen*, 217.
Snow vs. *Union Mut. & Mar. Ins. Co.*, 119 *Mass.*, 592.

The cases cited in the lower courts by the counsel for the insurers in support of his view that there cannot be a constructive loss of cargo, do not sustain him.

In the case of *Burt* v. *The Brewers and Malsters' Ins. Co.*, 78 *N. Y.*, 400, the insurance was specifically against "actual total loss" only, and of course no question of constructive total loss could arise thereunder.

In the case of *Chadsey* vs. *Guyon*, 97 *N. Y.*, 333, the cargo was warranted by the assured free from particular average. The subject of insurance was a shipment of potatoes in barrels, and the question considered by the Court was whether the insurance could be apportioned and made applicable to each barrel of potatoes, thus permitting the assured to recover in respect of a total loss of part.

In the case of *Humphrey* vs. *The Union Ins. Co.*, 3 *Mason*, 440, the subject of insurance was a cargo of lemons and oranges in boxes insured under the memorandum clause, free from particular average. The oranges were destroyed, while the lemons sustained comparatively slight damage, and the question was whether a recovery could be had for a total loss of part.

But to entitle the assured to recover his full insurance upon a constructive total loss, he must ordinarily make a timely abandonment to his underwriters. This is so in respect of insurance upon a vessel or of insurance upon cargo.

An abandonment, however, is not always necessary, nor even proper, in the case of insurance upon profits.

The latest English writer says:

"Notice of abandonment of profits may sometimes be "necessary. If there is no valid insurance on the goods "so that no abandonment could be made to the under- "writers on goods, a notice of abandonment should be "given in any case where it would be required with refer- "ence to the goods if the goods were insured. It is better "to give notice of abandonment in any case where the "goods are not totally destroyed."

Tyser on Mar. Ins. Losses, Sec. 109.

This is in acord with our own writers and our own decisions to the effect that an abandonment of profits is not necessary or proper when there is an insurance upon the goods themselves, for the reason that the insurer on goods has a right to a complete and absolute abandonment of the cargo with all of its increments and incidents.

"Profits are so far distinct from cargo that if both are "insured it is said that there may be a several abandon- "ment of each. But it is not easy to see how anything "can pass by the abandonment of profits. For the in- "surers on goods take by the abandonment to them "everything on which profits have been made, or can be "made or saved."

Parsons on Maritime Law, Vol. II., 394.

"A policy upon expected profits does not seem to offer "anything upon which an abandonment can operate. "And it does not appear from any speculation or any "judicial opinion relating to this subject which has come "to my knowledge that an abandonment of this interest "can be of any importance to the underwriters, other- "wise than as a notice that a total loss is claimed; and if "this is its only effect an abandonment is not necessary. "* * * It does not appear, therefore, that an abandon- "ment of profits can be anything more than a nugatory "ceremony."

Phillips on Insurance, Sec. 1503.

"But admitting that this is to be regarded as a valued "policy, it is said that the assured by abandoning the "cargo to its underwriters has put it out of the power "of the defendant to receive any salvage on the profits, "and that, therefore, he (the assured) has no right to re- "cover in this suit. This is a dilemma which the defend- "ant ought to have foreseen at the time of his subscrip- "tion; he must have supposed there was a policy on the "cargo which in case of disaster would naturally be "abandoned to those who had insured it. It is idle to "complain of what must have been clearly his own un- "derstanding of the contract; nor is it reasonable in him "to expect that for the purpose of recovering on a small "policy on profits a merchant should, by not abandoning "the cargo, forego his insurance on that subject."

Mumford vs. *Hallet*, 1 *Johnson's Rep.*, 433. 439.

In an earlier case the same Court, in passing upon a claim against the insurer of profits, said:

"Whatever might have been the claim of the defend- "ant (the insurer on profits) on the insurers of the cargo "if an abandonment had been made to them (on which "our opinion is reserved), we think, as between him and "the owner, he had a right to pay the first cost of the "goods with all the charges and profits, according to valu- "ation, and on those terms to insist on an assignment. "To enable him to assert this right there ought to have "been a seasonable abandonment which, notwithstand- "ing the decision just referred to, should always be made "as soon as possible, where the disaster, as was the case "here, is of such nature as not to divest the assured of "property. This is a case of some novelty on which "precedents throw very little if any light. It is very "probable, therefore, that our view of it may be incorrect, "but, after mature reflection, we cannot come to any "other result satisfactory to our own minds. If wrong, "the precedent will not work much mischief, for it can- "not be long before underwriters, in this State, at least, "discover the folly of insuring, unless at a very advanced "premium, either profits or freight."

Tom vs. *Smith*, 3 *Caines*, 245, 251.

As to the mere matter of form, therefore, it is apparent that the libellant is not prejudiced by the fact that an abandonment was not made to the respondent.

An abandonment, moreover, is not called for when the loss is total. The only function is to convert a constructive total loss into a total loss.

If the sugars were to be abandoned to any one they would need to be abandoned to the Atlantic Mutual Insurance Company. Such abandonment would take with them all profits in every form of increment and incident. There would be nothing left to abandon to the respondent. The reasoning in the case of *Tom* vs. *Smith* shows that the only object of abandonment to the respondent would be to enable it to redeem the abandoned cargo from the Atlantic Mutual, paying to the Atlantic Mutual its loss, and paying to the libellant its insurance. Such a right would be absolutely barren, a right as valueless as the abandonment of a ship that has been annihilated by storms and sent to the bottom of the ocean; and in such situation no abandonment is necessary (*District Court Opinion, Record, p.* 74.).

Fourth.

THERE WAS A VIRTUAL ABANDONMENT OF THE SUGARS BY THE LIBELLANT TO THE ATLANTIC MUTUAL INSURANCE COMPANY, AND AN ACCEPTANCE OF SUCH ABANDONMENT, BY WHICH THE SUGARS BECAME A CONSTRUCTIVE TOTAL LOSS TO THE LIBELLANT. AND WITH THE LOSS OF THE SUGARS, ALL PROFITS WERE LOST.

In determining the character of the transactions between the libellant and the Atlantic Mutual Insurance Company, the respondent, so far as it is concerned, is not in position to raise hypercritical questions as to form.

The course of events indicates an abandonment by the libellant to the Atlantic Mutual and an acceptance of abandonment by that company. There are forms lacking which would have been supplied at any moment by the libellant if the insurer had indicated a disposition to question the abandonment.

But forms may be waived and some were waived in this case. But such circumstances did not render the abandonment of the cargo less effective, nor can advantage be taken of any omissions of form by the respondent. Even a defendant underwriter may be held responsible for a constructive total loss when there has been no formal abandonment, upon the ground either that he has waived an abandonment or that his actions indicated that the proceedings were sufficient to constitute an abandonment.

"If an abandonment is wanting in any formality the "insurer may waive all objection, and they do this by "calling for the proof and acting as if the abandonment "were altogether sufficient."

Parsons on Maritime Law, Vol. II., 398.

"In the United States the courts hold, that where the "nature of the transaction is such as to leave no reason-"able doubt of the intention of the insured to abandon, "and of that intention being understood by the under-"writer, it shall be implied that a proper offer of aban-"donment has been made, though no formal notice can "be proved to have been given."

Arnould on Mar. Ins., 958, 959.

"Mr. Justice STORY, speaking of abandonment and "notice of abandonment in the case where notice was re-"quired by the policy, but neither the form of notice nor "the abandonment was described, said: 'They may be in "'one or two instruments; they may be in direct terms "'or by fair and natural inferences; it matters not how "'they are given or executed.'"

Phillips on Ins., Sec. 1678.

What happened in this case?

On July 7th the libellant telegraphed to the Atlantic Mutual that the *John E. Sayre* was reported ashore off the coast of Newfoundland (*Drummond, p.* 15). In acknowledging receipt of this notice the Atlantic Mutual announced that they had been previously advised of the disaster and had put the matter in the hands of Harvey & Co., their agents at St. Johns, Newfoundland (*Exch*, 5, *p.* 40).

The libellant took no part in the rescue of the sugar, was not asked to take part, and in fact was not expected to take part.

The Atlantic Mutual took entire control and on July 10th wrote to the libellant that sugar had been saved from the between-deck, and that they hoped "to arrange to have it sent to Montreal" (*Exh.* 6, *p.* 41).

A few days later, July 14th, the libellant, learning that inquires were being made in Montreal for a market for certain of the sugar, telegraphed to the Atlantic Mutual:

"Sugar supposed *ex John E. Sayre* being offered "her by brokers representing Newfoundland parties" (*Drummond, p.* 15).

On the same day this telegram was confirmed by a letter in which the libellant wrote:

"We gave no answer to these persons, but advised you "by telegram that *your local agent* at North Sydney *may* "*protect your interests*" (*Exh.* 6*x*, *p.* 41).

To which the Atlantic Mutual replied on the same date:

"Have not authorized sale. Master of *Sayre* agreed to "give salvors one-half sugar. We have directed all for- "warded to Montreal, allowing one cent pound salvage" (*Exh.* 7, *p.* 41).

In confirming this telegram the Atlantic Mutual wrote, setting forth the agreement made between the master and the salvors, and stating that they were in treaty to purchase the salvors' half of the salved sugar.

This is all that passed between the libellant and the Atlantic Mutual until the saved fragments of the shipment reached Montreal in August.

What had happened in Newfoundland?

The agent of the Atlantic Mutual had appeared at the scene of the wreck, had displaced the master of the *John E. Sayre*, had paid the ocean freight upon the sugars to the owners of the vessel (*Rouse, p.* 24; *Drummond, p.* 17), and had taken entire control of the cargo. The master testifies:

"Mr. Pike took charge of the cargo, and of course I had "paid some two or three hundred dollars expenses in "landing and storing it, which he paid me back; or two "hundred of it he paid me back. Well, that was all I "knew about the cargo. I was done with it then.

"Q. You left it then in his hands? A. I left it in his "hands" (*Rouse, p.* 23).

And under cross-examination he says:

"Q. When did you cease to have to do with the cargo, "captain? A. Well, when I was paid this $200 on ac- "count and instructed to give up the cargo by my owner.

"Q. That was about when? A. Well, I couldn't tell "you the date; it was one or two days or perhaps three "days after the ship was stranded, but the date I don't "just remember" (*Rouse, p.* 24).

The Atlantic Mutual's agents then weighed the sugar in the presence of the salvors, set off to the salvors the half that belonged to them (*Pike, pp.* 33, 34, 35; *Exhs.* 2, 3, *pp.* 71, 72).

The Atlantic Mutual were then in supreme control of the salved sugar. The master and owners of the *John E. Sayre* had been paid off and had left the scene (*Rouse, pp.* 23, 24; *Harvey, pp.* 26–31; *Pike, pp.* 33–38).

To be sure the Atlantic Mutual had undisturbed possession at first of only one sixteenth of the original cargo, the title to the remaining portion of the salved cargo being vested in the salvors. They, however, purchased the salvors' portion, and by purchase, *and by purchase only*, acquired title to another sixteenth. The sugar was then shipped to Montreal under a new contract of transportation. The original voyage had been broken up, and the contract between the shippers and the shipowner abandoned.

The new shipment was made in the name of Harvey & Co , they being the agents of the Atlantic Mutual Insurance Company, upon the coasting steamer *Tiber*, for delivery at Montreal, "to the Atlantic Mutual Insurance Company of New York" (*Harvey Exhs.* 17, 18, 19, *pp.* 66, 67, 68).

Here was a complete assumption and declaration of ownership by the Atlantic Mutual.

Mr. Drummond has testified to what occurred when the sugar arrived in Montreal.

" When it arrived the Atlantic Mutual sent a represen-
" tative (Mr. Darragh) to Montreal, who received it, and
" subsequently handed it over to us on a settlement.
" Q. From Mr. Darragh? A. Yes.
" Q. On what basis of value did you receive that sugar
" from Mr. Darragh, do you remember? A. I am not
" very sure; I think we took it approximately at its in-
" sured value, if I remember rightly.
" Q. Was any examination made by you of the grades
" of the sugar which arrived as to whether it was one,
" two and three, or not? A. Impossible to do that; we
" took it as an average.
" Q. It has been shown that certain of these bags of
" sugar were wet; was there any attempt made by you
" to adjust any item of loss in that respect accurately
" with Mr. Darragh? A. I don't think so " (*Drummond, p.* 16).
" Q. What do you consider as to your legal rights in re-
" spect to this sugar, when it came to Montreal? A. Prac-
" tically the sugar was in the possession of the Atlantic
" Mutual Insurance Company; was their property; but as
" its coming to Montreal would have brought it to a place
" where practically there was no market for it, we were
" obliged or considered ourselves entitled to deal with it
" apart from any question of legal rights on an equitable
" basis. We consequently arrived at a settlement as
" nearly mutually satisfactory as we could.
" Q. When that sugar came there did you think it was
" yours or theirs? A. It was theirs " (*Drummond, p.* 18).

The bills of lading of the *Tiber* under which the sugar was delivered in Montreal bear the endorsement of the " Atlantic Mutual Insurance Company by A. A. Raven, " Second Vice-President " (*Exhs.* 17, 18, 19, *pp.* 67, 68, 69), and under that endorsement the delivery was made.

The form of the transaction establishes that the sugars were regarded by both the libellant and the Atlantic Mutual as being the property of the Atlantic Mutual, and that they were purchased by the libellant from the Atlantic Mutual, at an average existing value substantially equal to the insured value. If the parties had been settling their loss upon the basis of a partial loss it is clear that the libellant would not have accepted the twenty-six tons

of wet sugar without specific allowance for the damage thereto. Nor would it have accepted the broken "assortment" at the full insured value.

If the libellant had declined to handle the sugar, when it came to Montreal, the situation was such that it could legally have insisted that an abandonment had been made and accepted, and could have collected a total loss from the Atlantic Mutual.

Both parties recognized this, and accordingly an adjustment was made, not upon surveys or upon any exact lines, but of a generally equitable character, by which, as the libellant alleges in its libel, it received the sugar "on ac- "count of and in part payment for the loss" (*Libel, Art.* 7, *p.* 3).

Certainly the respondent, who was not in any event entitled to an abandonment, has no right to question the position. The only right the libellant could possibly have had would be to intervene, pay the entire loss of the Atlantic Mutual, all the expenses of salvage and forwarding, a total loss under libellant's insurance upon profits, and take possession of the saved cargo.

Its only possible right, and this right is by no means admitted as a legal right, therefore, was to pay losses and expenses aggregating over $190,000, and to acquire title to sugars worth "about $20,000."

Naturally the respondent had no desire to make such intervention, though its agent in Montreal received "from time to time" all the information which the libellant had as to the position of the vessel and cargo (*Drummond, p.* 18).

Fifth.

ALL THE EQUITIES OF THE SITUATION ARE IN FAVOR OF THE LIBELLANT.

Not only has there been literally, in accordance with the terms of the certificate, a "total loss" of the profits, but

there has been a total loss of the profits on every grain of the sugars, through perils insured against.

While a small portion of the sugars reached destination, the circumstance was accomplished only by artificial measures and by extraordinary expenditures.

In respect of the sugars so delivered, the title to an undivided one-half had passed from the libellants to the salvors by virtue of Captain Rouse's agreement, and had passed from the salvors to the Atlantic Mutual by sale and purchase, and after being so vested in two strangers, came back to the libellant only by virtue of a "settlement" with the Atlantic Mutual (*Drummond, p.* 18),

Instead of the value of $181,000, which is admitted to have existed upon the day the respondent wrote its insurance (*Libel, Art.* 5, *p.* 2; *Ans., Art.* 4, *p.* 9), there remained a net value in Montreal of not over $7,000, to which the Atlantic Mutual was entitled, and in respect of which it had in fact practically accepted an abandonment.

The respondent made insurance upon the "profits" of the cargo, the only limitation being "against total loss only."

There is a provision which is commonly inserted in policies upon profits, and which Mr. Phillips thinks is quite essential for the protection of the underwriter. He refers to it as follows:

> "It accordingly appears to be quite necessary, in such "a policy, to stipulate for a settlement of loss and claim "for return of premium in the same manner as on the "goods, or to make some other agreement to avoid uncer-"tainty."
>
> *Phillips on Ins., Sec.* 1242.

This is practically accomplished by underwriters stamping the policy or certificate of insurance with these words or words equivalent thereto:

> "This company is liable only for the same proportion of "loss on profits that it would be under this policy on the "merchandise from which the profits accrue and is en-"titled to the same salvage."

The respondent did not so stamp its policy or certificate, and it is to be presumed that it received a due consideration in the way of premium for omitting such stamp.

It should have contemplated, and probably did contemplate, for it is an intelligent insurer, the responsibility imposed upon it by the insurance which it made.

It cannot claim exemption, after a loss occurs, which the contract of insurance does not give it.

Sixth.

THE UNITED STATES CIRCUIT COURT OF APPEALS HAVE ERRED IN HOLDING THAT THERE MUST BE AN ABSOLUTE AND ENTIRE LOSS OF CARGO IN ORDER TO EFFECT A TOTAL LOSS OF PROFITS.

There is no authoritative judicial decision in the United States distinguishing between a constructive total loss on cargo or vessel and a constructive total loss on profits.

The rule that a fifty per cent. loss affords sufficient foundation for a constructive total loss of either vessel or cargo is well established.

There is no rule requiring a broader basis for a constructive total loss of profits.

The English rule, which is more onerous upon the assured than the American rule in the measure of a constructive total loss on vessel or cargo, admits a total loss of profits when in ordinary parlance the profits have been eaten up or consumed by a marine peril, even though the subject matter out of which the profits grew continued to exist. Thus, in a case where the profits of a charter were insured "warranted free from all average," it appeared that the plaintiffs had chartered a steamer for a lump sum and had taken on a general cargo at freights aggregating several hundred pounds more than the charter hire, and had insured this surplus as profits. A certain portion of the cargo being damaged by marine perils was ruined, and the freight on such portion of the cargo was

lost. As a result, the freights actually collected by the assured from the remaining cargo, were less than the charter hire.

It was held that there was a total loss of profits.

Asfar & Co. vs. *Blundell*, 1 *Q. B.*, 1895-1896, *p.* 123.

The Circuit Court of Appeals holds in effect, not only that such a rule is bad, but it holds that a constructive total loss of cargo does not carry with it a total loss of profits, and it goes still further, and holds that *if any item of the cargo survives*, even in a damaged condition, or burdened with liens, there can be no total loss of profits.

There is some uncertainty among text writers as to what constitutes a total loss of profits; but no text writer has intimated any such rule as is laid down by the Circuit Court of Appeals.

Mr. Parsons argues that the necessity which rests upon the assured of transferring by abandonment to the underwriter on cargo the remnants of goods saved, in order to constitute a constructive total loss, creates an inability on the part of the assured to make any abandonment to the underwriter on profits; and that, therefore, there can never be a constructive total loss of profits.

Parsons on Maritime Law, *Vol. II.*, *pp.* 394-5.

Mr. Phillips makes a similar suggestion in his work.

The intimations of these writers relate, however, to instances where some portion of the cargo has come through to destination undamaged, and without extraordinary charges, so that there exists an *actual profit on such portion of the cargo*, which profit the assured is compelled to surrender to his underwriter on cargo, in order to claim a total loss.

The Circuit Court of Appeals has failed to note the reservations of these writers, and has applied their intimations to the case at bar, without observing that *there was no particle of profit* attaching to any portion of the remnant of sugars *that arrived* in Montreal.

The profits had been consumed by the breaking up of the "assortment" of sugar, by the physical damage through wet, and by the expenses of salvage, storage and forwarding.

The only judicial decision in the United States upon the question is that of Mr. Justice Kent in *Abbott* vs. *Sebor*, This opinion is opposed to the views of the text writers above referred to, but was accepted in this case by the District Judge as authoritative.

Mr. Justice Kent said:

"What shall be the criterion of an average of a total "loss in respect to profits I cannot at present with "clearness decide. Perhaps the established rule, in "respect of ship and cargo, of a loss of more or less "than half the subject in value may be applicable. If "so, the question here will be whether the more profit-"able half of the cargo might not have been brought in "the same ship to New York. I suggest this as a rule that "may perhaps supply."

Abbott vs. *Sebor*, 3 *Johnson's Cases*, 39, 46.

In the case at bar less than one-eighth of the cargo reached destination.

Let us suppose there had been no insurance on the cargo, but that only the profits over and above the prime value of $166,145 had been insured.

Let us suppose, further, that the original sea carrier had forwarded the fragment of saved sugar through to destination and delivered it –not from the original carrying vessel, but from a forwarding vessel—to the consignee. The delivery would have been burdened with salvage liens of fifty per cent., and liens for storage and forwarding expenses of fully fifteen per cent. The goods, themselves, would have been in a broken assortment and damaged by sea water. The net value delivered to the consignee would be $7,000 against an interest valued by the insurer of profits at $166,145. The $7,000 would not have represented sound sugar unencumbered by liens, but would have represented merely an equity under the burden of salvage and kindred expenses. Can it be said that the consignee who has suffered a loss of $166,145 must give

up all the remnants of the cargo to the insurer who has insured the profits?

The learned District Judge, in his accurate and well-reasoned opinion (*Record, p.* 73), shows full appreciation of the situation.

The learned Judges of the Circuit Court of Appeals have, we respectfully submit, gone astray on the facts, and have thereby been led to an unsound legal conclusion.

They are at direct issue with the learned District Judge; they are at direct issue with the only other American authority; they are at direct issue with the English authorities. Their conclusion is based upon the error of assuming that the libellant received any portion of profits.

They say in their opinion:

"By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket the *profits realized on the cargo saved*, "in addition to the amount of the respondent's policy. Ir-"respective of this consideratlon, *and because it has* "*received the profits on a part of the cargo*, we are of "the opinion that there has not been a total loss of profits, "within the meaning of the contract."

Opinion, p. 81.

The primary and the secondary considerations stated by the Court are strikingly similar, both depending for life upon the single incorrect proposition that the libellant has received profits on any portion of the cargo.

This blemish in the phraseology of the opinion is due to a correction which is apparent upon an examination of the original transcript of record. In writing the opinion originally, the Court said:

"By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket *nearly* $10,000 *in excess of its actual loss.* "Irrespective of this consideration, and because," &c., &c.

Original Transcript of Record, p. 127.

This erroneous statement was not corrected until after the record had been prepared for transmission to this Court. It was apparently understood by the Circuit Court of Appeals that the libellant was receiving not only its full in-

surance of $166,145 from the Atlantic Mutual, but that it was also receiving the net value of the damaged cargo, which was computed at "about $10,000, after deducting salvage and expenses" (*Opinion, p. 79*), and that it was seeking further to recover $15,000 from the respondent, with the result of putting into its pocket $10,000 over and above the full value of $181,145.

This misunderstanding is so radically wrong that it cannot be set right without a complete overturning of the structure erected by the Judges of the Circuit Court of Appeals.

That they should have carried such impression indicates that they failed to understand the facts of the case, and it was upon their misunderstanding of the facts that they based the rule of law under which they would have dismissed the libel.

If it is to be considered that the libellant did receive $166,145 from the Atlantic Mutual Insurance Company, then such consideration carries with it the necessary consequence that it did not *receive* any portion of the sugars, and that the $15,000 due from the respondent would merely make it whole. Its purchase of the remnant of damaged sugars at an agreed price would be deemed a collateral and immaterial fact.

If, however, it is desired to take into consideration the circumstance that the libellant did subsequently become possessed of the remnant of damaged sugars, it is necessary to understand that the *full* value of such sugars, "about $20,000," was credited upon the Atlantic Mutual's policy, and that the actual cash paid by the Atlantic Mutual, together with the damaged value of the sugars, together with the $15,000 from the libellant, aggregated barely enough to make the libellant whole.

The error of the Circuit Court of Appeals is not based upon any dispute of facts, because there is not a single disputed fact in the entire record; but upon a pure misunderstanding of the situation.

The gross value of the sugars which reached Montreal was admittedly "about $20,000" (*Libel, Art. 7, p. 3; Ans.,*

Art. 6, *p.* 10). The charges of salvage and storage and forwarding, whereby the value of the remnant of sugars was reduced from "about $20,000" to "about $10,000," as stated by the Circuit Court of Appeals (though actually reduced to about $7,000), were charges entirely foreign to the libellant, and were *never* in any manner within its contemplation. In taking the sugars over from the Atlantic Mutual the libellant allowed to the Atlantic Mutual $23,396.19, a valuation arrived at in view of the damaged condition and broken assortment of the sugars and substantially in accord with the sound insured value. It was a fair valuation and equitably arrived at. It was certainly a full valuation.

The libellant received simple indemnity from the Atlantic Mutual, its loss being paid by sugars valued at $23,396.19 and by cash $142,748.81, making a total of $166,145, the amount insured (*Policy, p.* 42).

Equally erroneous is the view taken by the Circuit Court of Appeals that the libellant has realized profits on that portion of the cargo which reached Montreal.

The Court has found as a fact that the Atlantic Mutual "adjusted the loss with the libellant by paying the "equivalent of the whole amount of its policy less the in-"sured value of the sugar delivered to the libellant" (*Opinion, p.* 78).

Practically this finding of fact is not far out of the way, although it would be more accurate to say that the Atlantic Mutual delivered the sugar which reached Montreal to the libellant in part payment of the loss under the policy at an agreed valuation substantially coincident with the insured value of the sugar, and that it paid the balance of its policy in cash.

The circumstance, whichever way the recitals are phrased, that the libellant took over the sugars in Montreal at substantially their insured value establishes indisputably the character of the transaction, and shows that the loss was settled as a total loss and not as a partial loss.

If the parties had been adjusting their differences on the basis of a partial loss there would necessarily have been a specific allowance for the damage to the twenty-

six tons of wet sugar and for the damage incident to the broken assortment of the sugars.

As it was, the libellant took over the sugars as though by purchase at an agreed average price. Whether their bargain was a good one or a poor one for either party is immaterial.

While this Court has never passed directly upon the point at issue in this action, it has held that insured profits are recoverable even though they are not tangibly earned and merely awaiting realization, as they were in the case at bar, but are mere expected profits. Thus, where a ship owner starting his vessel off as a trader upon a long round voyage, insured the expected profits of the venture in the valued sum of $20,000, and the vessel was lost with her cargo before she passed the first stage of her voyage, a full recovery was permitted without any proof that profits would have been realized if she had not met disaster.

In that case the Court said:

" It seems difficult to perceive why, if profit be a mere " excrescence of the principal, as some judges have said; " or an incident to or identified with it, as others have " said; why the loss of the cargo should not carry with it " the loss of the profits. This rule has convenience and " certainty to recommend it; of which this case presents a " striking illustration. Here was a voyage of many " thousand miles to be performed, the final profits of " which must have been determined by a statement of " accounts passing through several changes, some of " which might have resulted in loss, some in gain; and in " each case the good or ill-fortune of the adventure turn- " ing on the gain or loss of a day in the voyage. What " human calculation or human imagination could have " furnished testimony on a fact so speculative and for- " tuitous? To have required testimony to it, would have " been subjecting the rights of the plaintiff to mere " mockery."

Patapsco Ins. Co. vs. *Coulter*, 3 *Peters*, 221, 241.

In an early English case it was held that the breaking up of a voyage through the loss of a vessel, the cargo being

entirely saved and reaching destination, constituted of itself a total loss of profits, the theory being that the merchant was entitled to a delivery at destination from the vessel in which the goods had been shipped.

Barclay vs. *Cousins*, 2 *East.*, 544.

The rule suggested by the Circuit Court of Appeals, that every ounce of cargo must be lost physically in order to entitle the libellant to recover, cannot be commended as either fair or as being within the ordinary contemplation of the parties. It would permit the respondent, upon seeing the loss of $15,000 staring it in the face, to make an expedition and bring to Montreal a single bag of sugar, and upon landing it there, find itself discharged from all liability, the libellant being cut off from an examination even of the expenses to which its insurer had been subjected in order to make this "mere mockery" of a delivery.

Seventh.

IT IS RESPECTFULLY URGED THAT THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT A MANDATE SHOULD ISSUE TO THE DISTRICT COURT TO EXECUTE ITS JUDGMENT HERETOFORE ENTERED, WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant and Petitioner.

WILHELMUS MYNDERSE,
Advocate.

No. 69.

Reply Br. of Respondent for Petition

Filed Oct. 24, 1899.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 24 1899
JAMES H. McKENNEY,
Clerk.

THE CANADA SUGAR REFINING COMPANY,
Libellant and Petitioner,

AGAINST

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

No. 69, October Term, 1899.

REPLY TO RESPONDENT'S BRIEF.

First.

It is perhaps irrelevant, in view of what was actually done by the owner and the insurer of the sugars, to determine whether or not the libellant had a legal right to abandon the cargo to the Atlantic Mutual Insurance Company.

Both parties treated the case as though such right of abandonment existed; and both recognized in effect the practical abandonment that was made.

The respondent herein now asserts that there was no right of abandonment under the Atlantic Mutual's policy upon the cargo. And respondent's counsel, at page 10 of his brief, quotes from such policy two clauses upon which the contention is based. If the question is to be considered at all, it should receive accurate consideration.

The policy does, indeed, contain the quoted words,

though they have lost their proper significance by deletions and by separation from the context.

The full text of the clause first cited is:

> " Warranted by the insured free from damage or
> " injury from dampness, change of flavor or being
> " spotted, discolored, musty or mouldy, except
> " caused by actual contact of sea water with the
> " articles damaged, occasioned by sea perils. In
> " case of *partial loss* by sea damage to dry goods,
> " cutlery or other hardware, the loss shall be as-
> " certained by a separation and sale of the portions
> " only of the contents of the packages so damaged,
> " and not otherwise; and the same practice shall
> " obtain as to all other merchandise, as far as
> " practicable."

The warranty against freedom from average having been opened by a loss exceeding seven per cent. (*see Policy*), the clause now quoted, might, under some circumstances, if sugars are to be deemed merchandise, be applicable to measure the loss. By its terms, however, it would be applicable only to cases of "partial loss," and moreover only to cases of "partial loss by sea damage."

It would play no part whatever in the case of a total loss, either actual or constructive, except for the purpose of determining whether the damage was sufficient to constitute a constructive total loss. The constructive total loss being established, the clause would have no function, In this case, where less than one-eighth of the cargo survived the disaster at all, and that one-eighth was burdened with expense far exceeding one-half of its value, a constructive total loss existed. The clause therefore has no function.

The counsel for the respondent, for further support to his contention, cites another provision of the Atlantic Mutual policy.

> " Each invoice of other goods not less than $5,000
> " insured value, subject to separate average as if
> " separately insured; also each invoice of less than
> " $5,000 subject to separate average if the damage
> " amounts to an average on $5,000."

A suggestion is made by the counsel for the respondent, at page 10 of his brief, that the cargo of the *John E. Sayre* was in three separate invoices, and that there is no sufficient evidence to establish a constructive total loss of each of the invoices.

There were indeed nominally three invoices; but not invoices of such a character as to put this clause of the policy in operation. The sugars were all shipped by Ker & Company, and all were shipped to the same consignment. They were sold by the shippers to the libellant as an entire cargo (*Drummond*, 12), and under a contract stipulating for a "usual assortment" of grades (*Drummond*, 14). Such "usual assortment" was secured only by a consolidation of the three so-called invoices.

Moreover, even considered as separate invoices, the proofs establish a constructive total loss of each invoice. The gross weight of all sugars that came out of the wreck was only 334 tons, and of this weight one-half belonged to the salvors, leaving only 167 tons to which the libellant had any title as the sugars reached the Newfoundland coast. There were 1,413 tons in one so-called invoice, 500 tons in another, and 546 tons in the other. Assuming that every ounce of the sugars which came out of the wreck was covered by the smallest invoice—the invoice for 500 tons, it is apparent that not enough sugars survived to enable the insurer to avoid a constructive total loss. Moreover such a rule cannot be invoked by any one except the direct insurer; and if the rule has any theoretical merit, it is to be assumed, from the course of action of the parties, that the facts did not fairly put it into operation.

Second.

The counsel for the respondent omits to note in his consideration of the case of *Tom* vs. *Smith*, 3 Caines Reports, 245, on page 12 of his brief, that the decision of the Court in dismissing the claim, turned upon the fact that the

insured accepted his *entire* cargo at the port of distress, sold it there at a price "much about the same price it "would have yielded in New York," the port of destination, invested the proceeds partly in rum and molasses, and partly in bills of exchange, later sustained losses on these new ventures, in part through change of market and in part through non-payment of certain of the bills of exchange, and did not look to his underwriters for these indirect losses until three years after the original disaster. The case, therefore, is scarcely pertinent to the present argument, although it is in a measure useful as indicating that the only relief which the insurer of profits could secure by an abandonment, would be to secure possession and title to the saved portion of the goods on paying not only the insurance on profits, but in addition, either the insured value of the cargo, if insured, or the prime cost of the cargo, if uninsured.

To apply this rule to the case at bar, the respondent, upon an abandonment, if one has been formally tendered and accepted, would have had the right to take delivery of some 300 tons of sugar worth $20,000 upon paying, therefor, $165,000 to the Atlantic Mutual Insurance Company, $10,000 to salvors, &c., and $15,000 to the libellant —an "absurd alternative," as Judge Brown says (*Record, p.* 74).

Third.

The counsel for the respondent urges that insurance against total loss imposes no liability upon the insured in respect of a constructive total loss.

The cases upon which he relies on pages 14–18 of his brief are *all of them* cases in which the goods were insured "free of particular average."

In respect of goods so insured it is held in some States, though not in all, that there can be no constructive total loss.

The cases which the counsel cites, it will be seen, do not go far enough for the respondent's relief. In those States in which a constructive total loss is allowed, even when cargo is insured free of particular average, it is naturally held that insurance free of particular average is substantially the same as insurance against total loss only.

In those States, however, where it is held that there can be no constructive total loss upon goods which are insured free of particular average, it is held that insurance against "total loss only" covers a constructive total loss, and the distinction is sharply drawn between a total loss and an actual or absolute total loss.

The counsel for the respondent urges that the policy issued by the respondent "comes within the line of de-"cisions upon memorandum articles which are wholly "free of particular average" (*p.* 16), alleging in support of his contention that the exemption from partial loss in the cargo policy was restricted to a percentage, but that the exemption in the profit policy contained no such limit. In this he errs. The cargo policy does indeed contain the provision that sugar is warranted by the insured free from average under seven per cent. unless general (*Ex.* 9, *p.* 42), but the profits policy also contains exactly the same clause respecting sugar (*Ex.* 11, *p.* 56). In respect of "profits," the policy not only does not contain a restriction of the exemption to a percentage, but does not contain any exemption whatever in respect of partial losses (*Ex.* 9, *pp.* 55-58).

Nor does the certificate of insurance contain any such exemption (*Ex.* 4, *p.* 40).

There is no peculiar law applicable to "memorandum articles." The insurer and the insured are governed in respect of such articles by the specific provisions of the policy under ordinary rules of construction. If the policy provides that such articles are warranted entirely free of average, unless general, the loss is adjusted accordingly, and if it provides that the articles are warranted free of particular average under a stated percentage the loss is adjusted upon such lines.

Fourth.

We refer again to our contention that the prime cost of the sugars is not material to the consideration of whether or not profits survived the disaster. The only basis upon which the respondent is entitled to consider the existence of profits is upon the basis of a value for the sugars of $166,145, that value being stated to and accepted by the respondent as the insured value of the cargo at the time the insurance on profits was made (*Record, p.* 11).

Fifth.

The counsel for the respondent, on page 22 of his brief, indicates that he does not appreciate one of the classes of damage which the sugars which reached Montreal sustained. Those sugars came to Montreal in a mixed assortment, not in the "usual assortment." Iloilo sugars are in three grades, and they are bought and sold in the market under the "usual assortment" of one-eighth of grade No. 1, two eighths of grade No. 2, and five-eighths of grade No. 3 (*Drummond*, 14). The grade of the sugars which came forward could not be determined, some of the sugars being wet and others having been re-bagged. It was impossible to determine how nearly the sugars, as delivered, approached the "usual assortment" (*Drummond*, 14).

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant and Petitioner.

WILHELMUS MYNDERSE,
Advocate.

No. 69.

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JAMES H. McKENNEY,
Clerk.

Filed Feb. 2, 1900.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY,
Libellant and Petitioner,

AGAINST

THE INSURANCE COMPANY OF NORTH AMERICA.

No. 69.
October Term,
1899.

The annexed motion to amend the decree herein in respect of the allowance of interest, will be submitted to the Supreme Court of the United States on the fifth day of February, 1900, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

New York, January 29, 1900.

WILHELMUS MYNDERSE,
Advocate for Petitioner.

To CLIFFORD A. HAND, Esq.,
Advocate for Respondent.

SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, Libellant and Petitioner, AGAINST THE INSURANCE COMPANY OF NORTH AMERICA.	No. 69. October Term, 1899.

And now comes the Canada Sugar Refining Company, petitioner herein, by its counsel, and moves that the decision or decree made herein by this Court on the 8th day of January, 1900, be modified with such effect as to specially direct the payment of interest to the petitioner upon the amount of the decree of the District Court.

SUPREME COURT OF THE UNITED STATES.

THE CANADA SUGAR REFINING COMPANY, Libellant and Petitioner, AGAINST THE INSURANCE COMPANY OF NORTH AMERICA.	No. 69. October Term, 1899.

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION.

This action was brought by the petitioner to collect $15,000, a specific amount insured upon the profits of a cargo of sugar, together with interest (*Libel, Record, p.* 4).

The action was brought in admiralty and resulted in a decree in the District Court in favor of the petitioner, for the full amount of the insurance, with interest to the date of the decree, and costs (*Decree, Record, p.* 75).

Upon appeal to the United States Circuit Court of Appeals the decree of the District Court was reversed (*Record, p.* 8).

The cause was then heard upon a writ of *certiorari* in this Court, and a decree was made on January 8th, directing that the decree of the District Court be affirmed, with costs.

There was no direction in respect of interest.

The mandate has not yet issued.

This Court has made certain provisions respecting the allowance of interest, in Rule 23.

By paragraph 1 it directs that in all cases of writs of error where the judgment of the inferior court is affirmed, interest shall be calculated and levied at the rate that similar judgments bear interest in the courts of the State where the judgment was rendered.

By paragraph 2 provision is made for damages as well as interest, in cases where a writ of error appears to have been sued out merely for delay.

By paragraph 3 the same rule is applied to decrees, for the payment of money in cases in equity, "unless otherwise ordered by the Court."

Paragraph 4, as recently amended, in 1890, reads;

> "4. In cases in admiralty damages and interest may be allowed if specially directed by the Court."
>
> 133 *U. S.*, *p.* 711 (*Appendix*).

By Rule 38 of this Court the provisions of Rule 23 in regard to interest is made applicable to writs of error, and to appeals and reviews under the provisions in Sections 5 and 6 of the Act of 1891, establishing the Circuit Court of Appeals.

> 139 *U. S.*, *p.* 707 (*Appendix*).

There is a serious question, therefore, whether under the present form of decree of this Court the petitioner would recover interest upon the decree of the District Court.

The reason of the discrimination in respect of interest in admiralty cases is stated by this Court to be that

> "in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.
>
> "And it will sometimes happen in an admiralty case, that this Court will think that the damages estimated and allowed in the Circuit Court are too high, and yet the opinion here may approximate so nearly to that of the court below, that this Court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate

"of interest upon decrees in admiralty, whenever
"the decree is affirmed, could be adopted with jus-
"tice to the parties."

Hemmenway vs. *Fisher*, 20 *How.*, 255, *p.* 260.

The present case, being purely for a contract amount, seems to be outside of the reasons which originally controlled the Court in reserving its right to allow or disallow interest in admiralty cases.

It is quite akin to the common law cases in which interest is allowed as a matter of course.

The petitioner paid premiums for a specific amount of insurance, and is not receiving the full value of such insurance unless it recovers interest from the date of the decree of the District Court.

The decree of the District Court would have been executed in June, 1897, but for the appeal taken by the respondent. The delay in the enforcement of the decree has been due solely to the appeal taken by the respondent, and upon such decree being restored to efficiency it should be payable with interest.

For the sake of avoiding any question in the District Court we respectfully submit that the decree of this Court should be modified so as to "specially direct" the payment of interest.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT.

IN THE MATTER

of

The Petition of THE CANADA SUGAR REFINING COMPANY, LIMITED,

In

U. S. Circuit Court of Appeals for the Second Circuit.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Brief on the Part of Respondent.

We cannot undertake to now anticipate the argument of this cause, if it shall please the Court to grant the petition of the libellant. The few days of time allowed us by the libellant are too short for such a purpose. Nor do we understand it to be the intent of the practice to hear the case with reference to anything like a decision of it, or to

commit the Court in this first instance to any theory of or for such a decision. The only point, now under consideration, is whether the questions, passed upon by the Circuit Court of Appeals, were of sufficient gravity and importance to justify the libellant in demanding the exceptional privilege of a review by the Supreme Court.

The essential facts, displayed by the record, are that a cargo of about twenty-four hundred tons of sugar (73,089 mats) was shipped, at Iloilo, by the ship "John E. Sayre," consigned to the libellant at Montreal; that this cargo was insured by the libellant, with Atlantic Mutual Insurance Company (hereinafter designated cargo underwriter) at a valuation of seven dollars and a half to the pound sterling, amounting in American currency to $166,145 (Record, Ex. 9, page 66); that a very considerable profit was included in the sum insured, through the valuation of the pound sterling at more than fifty per cent. above the true value of a pound sterling; that the valuation of the cargo, in the opinion of the District Court and in the arguments of counsel for the libellants, at one hundred and eighty-one thousand dollars, is an erroneous and illusive method of valuation, inasmuch as it is applied to property at sea in the course of a long voyage and includes the hope or expectation of profit on safe arrival; that, in other words, commercial usage and commercial law invariably separate the two interests and distinguish between original value or invoice cost, and this expected profit; that, after obtaining the above-named insurance from the cargo underwriter, the libellant obtained the further insurance on profits, of which a copy is given on pages 3 and 4 of the petition of the libellant; that this last insurance was for "$15,000 on profits on cargo of sugar *against total* "*loss only* valued at sum insured," etc.; that,

sailing from Iloilo on 10th February, '93, the ship, with its cargo on board, was stranded on the coast of Newfoundland, during the first few days of July, 1893, and the master at once, in the exercise of his authority, employed local salvors and got out a portion of the cargo and had it stored in safety on shore (Record, folios 135, 136 and 141); that the ship became a total wreck and the residue of the cargo was lost; that thereupon the cargo underwriter intervened for the purpose of getting the cargo forwarded to Montreal and settled up the expense and salvage accounts and procured transshipment to Montreal of what was saved; that this intervention of the cargo underwriter was in accordance with the sue and labor clause of the cargo policy, making it the duty of the assured and the right of the insurer "to sue, labor and travel for, "in and about the defence, safeguard and recovery "of the said goods and merchandises, or any part "thereof, without prejudice to this insurance" and providing that neither the "acts of insured "or insurers in recovering, saving and pre-"serving the property insured in case of disaster, "be considered a waiver or an acceptance of an "abandonment" and was always in accord with the correspondence between the cargo underwriter and the libellant (Record, Exs. 5 to 8, pages 63 to 65); that having paid the expense account at the scene of wreck, the cargo underwriter caused the bills of lading for the saved sugar by the forwarding vessel to run to itself, but upon arrival at Montreal endorsed these bills of lading and delivered them to the libellant, who received the saved cargo with no expense or charge to themselves, excepting the difference between the proportion of original freight and transshipment freight applicable to this saved cargo, and which original freight would have been payable by the libellant in any event; that there-

upon the cargo underwriter settled its policy with the libellant as their insured; that while in the testimony of Mr. Drummond, an officer of the libellant, an effort was made by counsel to confuse the question in some degree, yet it is clear that the cargo was received by the libellants at Montreal and that the settlement with the cargo underwriter was on the basis of a partial loss; that this is conclusively established by the endorsements upon the cargo policy itself (Record, Ex. 9, p. 66), which are endorsements of partial loss settlement; and that the transaction resulted in the receipt by the libellants, dry and uninjured, of about ninety-two hundred sacks (weighing over 307 tons) of their cargo, as well as about twenty-five tons in a damaged condition and as well also as payment by the cargo underwriter for all the cargo that was lost (See as to particulars of the saved cargo the transshipment bills of lading, Exs. A. W. H., 17, 18 and 19, Record, pages 104 to 108). In short and in so far as concerns this saved cargo, to the extent of three hundred and seven tons, and being about one-eighth of the original shipment, it came to the hands of the libellants as free from loss, injury or charge, as would have been the case if no disaster had occurred. It may be added that there is nowhere in the record any evidence, or indeed claim, that there was ever an abandonment to either cargo underwriter or underwriter on profits.

The insurance, by the respondents, bound them to pay fifteen thousand dollars in case, and *in case only, of total loss of profits.* That there was no such total loss is undeniable, indeed is matter of arithmetic. When a substantial part of the cargo reached the libellants at Montreal sound and uninjured, it carried with it its own proportion of the profits. There is no evidence that this part of the cargo was not, when it reached their hands, of the full

expected value, nor that the libellants did not realize the entire profit anticipated by them upon that part of their cargo, nor is it deniable that if the recovery by them in the District Court had been sustained, they would have in their pockets this profit thus actually realized by them and also the fifteen thousand dollars which included or duplicated such realization. Without precipitating a discussion of the general doctrine of profits and their relation to cargo and the loss of profits as dependent upon loss of cargo, which is understood to have been settled in our courts by the Patapsco case (3d Peters, 222), we have the plain case of actual absence of total loss of profits, and therefore, it would seem, of actual absence of any right to recover under the profit policy obtained from the respondents. Nor can it be useful to suggest that contracts of this kind, carefully limited as to the character of risk, are made by and with merchants competent to care for their own interests and content, with reference to the stipulated premium, to carry on their own shoulders such hazards as are excepted from the insurance.

Inasmuch as the petition quotes at considerable length from the opinion of Judge Brown, in the District Court, and lays much stress upon that opinion, which has seemed and still seems to us to have been in error in all essential particulars, we annex a copy of the opinion of the Circuit Court of Appeals, delivered by Judge Wallace. And we content ourselves with this brief statement of reasons why, in our humble judgment, the record is not one calling for the unusual intervention of this Honorable Court to disturb the finality provided by law for the judgments of the Circuit Court of Appeals. Indeed, such an application for intervention, in any case, involves serious embarrassment to the successful party of entering upon a

premature or preliminary partial argument in support of his judgment, and which cannot but be unsatisfactory to both court and counsel.

Respectfully submitted,

CLIFFORD A. HAND,
Attorney and of Counsel for the
Respondent.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE CANADA SUGAR REFINING COMPANY, LIMITED,
Appellee,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Appellant.

WALLACE, Circuit Judge:

The libel in this cause was filed to recover upon a contract of insurance with the libellant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy No. 117,407 against perils of the sea "15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient toward fully covering the property at risk. The sugar was owned by the libellant, consisted of about 2,460 tons, was of the value of about $181,000, and was insured for $166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libellant, and an advance in market price since its purchase

by the libellant; and when the insurance with the appellant was effected there had been a still further advance in market price, so that the insurance on profits really covered a profit which had accrued to the libellant when it was effected. The appellant had been informed by the libellant of the insurance upon the cargo. July 6th the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The master at once made arrangements with local salvors for saving and storing the cargo, agreeing to give them one-half saved. The salvors removed from the ship to their own vessels all the cargo capable of being saved. The master was about to arrange for the transportation to Montreal of the part not going to the salvors when the Atlantic Mutual Insurance Company, which had meantime been informed of the disaster, intervened and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one-half of the sugar saved, and caused the sugar saved to be re-conditioned and shipped to Montreal on the steamer "Tiber" and delivered upon arrival there to the libellant. The expenses incurred by the Atlantic Mutual Insurance Company for reconditioning and forwarding the cargo, and adjusting the claims of the salvors, amounted to $10,167. That company also paid the ocean freight upon the quantity of cargo saved. It adjusted the loss with the libellant by paying the equivalent of the whole amount of its policy less the insured value of the sugar delivered to the libellant. The cargo delivered to the libellant consisted of 307 tons of dry sugar and about 26 tons of wet, and was of the value of about $20,000. There was no notice of abandonment given to the appellant.

Upon these facts the Court below was of the

opinion that there had been a total loss of the profits insured within the meaning of the contract, and decreed accordingly for the full amount of the insurance.

The subject of insurance was not the libellant's cargo of sugars, but the profits, and the total loss to which the liability of the underwriter was restricted by the contract of the parties was a total loss of profits. That there was no actual total loss of profits is entirely clear. Insurance of profits of a cargo is an engagement by the underwriter that the goods shall not be prevented by the perils insured against from arriving at their destination in a condition for earning profits; and in a valued policy the parties fix for the purpose of adjusting a loss the sum which the cargo would earn upon safe arrival by way of profits. Under an insurance of profits a loss of cargo carries with it, of course, the loss of the profits, at least is *prima facie* evidence of their loss; and under a valued policy the assured is entitled to recover the whole insurance upon proof of a total loss of the goods, without proof that any profits would have been made if the goods had arrived. Barclay *vs.* Cousins (2 East., 544); Patapsco Insurance Company *vs.* Coulter (3 Peters, 222); Mumford *vs.* Hallett (1 Johns., 439); Fosdick *vs.* North American Marine Insurance Company, (3 Day, 108); French *vs.* Hope Insurance Company, (16 Pickering, 397). "If a part of the goods only are prevented from arriving it constitutes a partial loss of those interests, according to the construction put upon it in the United States." 2 Phillips on Insurance, Sec. 1503. In other words, there can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (Loomis *vs.* Shaw, 2 Johns Cases, 36) notwithstanding a greater part have been destroyed by the perils insured against. Wain *vs.* Thompson

(9 S. & R., 115). In such a case under a valued policy, the insured can only recover of the underwriter the valuation less the profits to be accounted for. French *vs.* The Hope Insurance Company, *supra*. It is only in a case of total loss that there is any difference between an open and valued policy. Marshal on Insurance, 268, 618. Bateman's Commercial Law, Sec. 1129. In the present case the value of the cargo saved was comparatively insignificant, being only about $10,000, after deducting salvage and expenses, or alternatively something over 150 tons of dry sugar out of 2,460 tons; but part having been saved and actually received by the libellant, there was not an actual total loss. A loss of part of the cargo is a proportional loss on profits.

The question then arises whether the libellant was entitled to recover upon the theory of a constructive total loss. A constructive total loss is one where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value of the goods. So also it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value, and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total

loss, except in those where it could not possibly be of any benefit to the insurer.

By the later authorities it is settled that under a policy insuring a ship or cargo against "total loss only," the assured is entitled to recover upon proof of a constructive total loss. Adams *vs.* MacKenzie (13 C. B., N. S., 422); Heebner *vs.* Eagle Insurance Company (10 Gray, 131); Green *vs.* Pacific Insurance Company (9 Allen, 217); Burt *vs.* Brewers and Malsters Insurance Company (78 N. Y., 400); Carr *vs.* Security Insurance Company (109 N. Y., 504); Snow *vs.* Union Mutual and Marine Insurance Company (119 Mass., 592). It is a reasonable intendment that when an underwriter offers to indemnify the insured against a "total loss," he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability he can protect himself by insuring against actual or absolute total loss. It does not necessarily follow that these words are to be given the same meaning in a policy upon profits as in a policy upon cargo; and our opinion is that they cannot have the same meaning. How can there be a constructive total loss of profits? In all cases where the destruction of the voyage or the damage to the cargo renders it impracticable, because the outlay will exceed the returns, to go on with the adventure there is an actual total loss of profits, though it may be there is only a constructive total loss of the cargo. The moiety rule cannot apply, because the profits cannot be separated from the goods themselves, and an abandonment is ordinarily so impracticable that the rule cannot be supposed to have entered into the contemplation of the parties when making their contract. It has never been decided that in case of an insurance of profits, an actual partial loss of the profits can be made

total by abandonment, and the commentators incline to the contrary view. Mr. Phillips says: "On the whole it does not seem that the rule of constructive loss of over fifty per cent. of the value is applicable to a policy on profits in favor of the owner of the goods under any circumstances." Phillips on Insurance, 1656. Prof. Parsons, after intimating that an actual partial loss of profits cannot be made constructively total by abandonment, uses this language: "It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits unless the insurer (the assured) should waive his right to abandon the goods, and treating the loss of them as partial, abandon the profits separately. In theory this might be possible, but it would be attended with some difficulties, and can hardly be considered as in fact practicable." 2 Parsons on Marine Insurance, 170–171. If there can be no constructive loss of profits the words "against total loss only" in an insurance upon profits can only refer to an actual total loss. They certainly cannot refer to a partial loss. They can have no effect whatever, if, as has happened here, the assured can retain part of the profits and yet recover as though all have been lost.

The present contract, in view of the extrinsic facts, was intended to be in substance a second insurance on the goods themselves, "another way of valuing the goods." Tom *vs.* Smith (3 Caines, 247), to cover the value represented by the advance in market price, and not adequately protected by prior insurance. See Ionides *vs.* Pender, L. R., 9 Q. B., 531–536. Indeed, it is customary at the place where this contract was made to insure profits under the general denomination of "goods." Pritchett *vs.* Insurance Company of North America (3 Yeates, 461). If the cargo itself instead of the profits had been the interest insured,

the libellant would have been indemnified only to the extent that the prior insurance might prove insufficient. Insurance is a contract of indemnity, and cannot extend to cover the loss in excess of the real loss; and even under a valued policy, where there is a prior insurance, the assured cannot recover upon it more than will, with what has been received from the prior insurance, make up his whole loss. Craige *vs.* Murgatroid (4 Yeates, 161); Watson *vs.* Insurance Company of North America (3 Wash., C. C., 1); Stevenson *vs.* Piscataqua Insurance Company (54 Me., 71); Pleasance *vs.* Maryland Insurance Company (8 Cranch, 55). The property at risk was really the cargo, because the profits were merely an excrescence of the goods; and if the contract had not been "against total loss only," the appellant would have been liable only for the deficiency. It cannot be that the insertion of these words were intended to enlarge the extent of the appellant's liability. They were meant to restrict it. They were used in view of the doctrine, expressed by the commentators upon insurance, that there cannot be a constructive total loss of profits. We think the insurance was placed upon the profits instead of upon the cargo directly, and restricted to a total loss only, to save any question as to the liability of the appellant for a partial or constructive total loss; otherwise there would have been no occasion for naming that interest, and the insurance would have been upon the cargo itself.

By the decree of the Court below the libellant has been awarded a recovery, which, if collected, would put into its pocket the profits realized on the cargo saved, in addition to the amount of the respondent's policy. Irrespective of this consideration and because it has received the profits on a part of the cargo, we are of the opinion that there has not

been a total loss of profits within the meaning of the contract.

The decree is reversed, with costs, and with direction to dismiss the libel.

(Endorsed): United States Circuit Court of Appeals, Second Circuit.—The Canada Sugar Refining Company, Ltd., Appellee, *vs.* The Insurance Company of North America, Appellant.—Opinion, Wallace, *C. J.*—United States Circuit Court of Appeals, Second Circuit, filed Apr. 19, 1898, William Parkin, Clerk.

(A copy.)

WM. PARKIN,
Clerk.

[SEAL.]

No. 290. 69

FILED.
APR 1 1899
JAMES H. McKENNEY
CL

Supreme Court of the United States.

Brief of Hand for Appellee

THE CANADA SUGAR REFINING COMPANY,

Filed April 1, 1899.

Libellants and Appellants,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,

Respondents and Appellees.

BRIEF OF APPELLEES.

CLIFFORD A. HAND,
Counsel for Appellees.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY,
Libellants and Appellants,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondents and Appellees.

Brief of Appellees.

The facts established by the record, upon a just and reasonable construction of them, are few and indisputable. Without making them the subject of formal preliminary statement, they will be referred to in the following points in so far as is supposed to be necessary.

I.—*The insurance obtained by the appellants from the appellees, was explicitly against nothing short of total loss of profits of the cargo of sugar on board the ship "John E. Sayre," which sailed from Iloilo, February 10th, 1893, bound for Montreal in Canada.*

(1.) At the time of obtaining their insurance from the appellees, the appellants had already obtained from another underwriter, the Atlantic Mutual Insurance Company, insurance upon the cargo itself (See policy Ex. 9, p. 66). And the valuation of the pound sterling, at $7.-50, had included a profit in this cargo insurance.

(2.) The terms of the insurance, obtained by the appellants from the appellees, were embodied in the written certificate (Ex. 4, p. 40). Thereby it was certified that

the appellees "insured under policy No. 117, 407, made "for Robert Hampson, $15,000, on profits on cargo sugar "against total loss only, valued at sum insured, shipped "on board the Br. ship 'John E. Sayre,' at and from "Iloilo to Montreal, and the loss, if any, subject to the " terms and conditions of the policy has been made pay- " able to the order of Canada Sugar Ref'g. Co. L't'd. on " surrender of this certificate."

(3.) The policy to which this certificate attached, is Ex. 11 (p. 55). The provision of chief present importance is what is known as the "Sue and Labor Clause," of almost universal use and cognizance, to the effect that "In case of any loss or misfortune, resulting from any " peril insured against * * * the acts of the assured " or assurers, or of their joint or respective agents, in " preserving, securing or saving the property insured in " case of danger or disaster shall not be considered or " held to be a waiver, or acceptance of abandonment." (P. 55, fol. 89.)

(4.) There is no room for ingenious liberality of construction, in behalf of the assured, under such a contract of insurance. It was with merchants keenly alive to their own interest and skillful in caring for that interest. Its very brevity and simplicity made its meaning too plain for misunderstanding by them. The words, " total loss only," were too expressive to admit of such misunderstanding.

(5.) Whether this sharply defined limitation of the risk, undertaken by the appellees, was by reason of unwillingness of the appellants to pay a premium, suited to an unrestricted risk, or by reason of the speculative character of the subject of insurance, does not concern us. The contract is as it was made between intelligent and competent parties, and is to be respected and interpreted according to its plain purport.

II. *There was in truth no total loss of the insured profits.*

(1.) Although the "John E. Sayre" was stranded at the western end of Newfoundland opposite the mouth of the St. Lawrence River, yet a substantial part of her cargo was at once saved, dry and in good condition, and transshipped up the river to Montreal, its original port of destination. It was there delivered to, and received by, the appellants and without a dollar of expense to them. The means by which this was accomplished, are referred to in Point IV. For the moment the simple and indisputable fact is all that need be stated. The bills of lading, for this transhipment, were introduced in evidence by the appellants and are found on pages 66, 67 and 68. The bill "A. W. H. 17," (fol. 105), was for "4583 sacks *dry* sugar, 153 tons 12 cwt. 0 qrs. 12 lbs." The bill "A. W. H. 18," (fol. 106), was for "4596 sacks *dry* sugar, 154 tons 2 cwt. 0 qrs. 13 lbs." And also for "670 sacks wet sugar, 20 tons 18 cwt. 2 qrs. 20 lbs." The bill "A. W. H. 19," (fol. 107), was for "175 sacks wet sugar, 5 tons 9 cwt. 1 qr. 23 lbs."

(2.) The result was that, of their cargo of sugar, 9179 sacks, weighing something over 307 tons, reached the appellants at the port of destination, sound and uninjured, and was there taken into possession by them to be sold or disposed of at their pleasure. The same was the case with the 845 sacks of wet sugar. Without, however, reckoning these last into the account, it is evident that what thus reached the port of destination and the appellants, in good order, was about one-eighth part of the entire original cargo.

(3.) Nothing in the record shows, or tends to show, that the profits, on the portion of the sugar thus saved, were not realized by the appellants. The intervention of the cargo underwriter, Atlantic Mutual Insurance Com-

pany, is subsequently and separately dealt with in this brief. Mr. Drummond, the President of appellants, testified that no claim for total loss was made against this cargo underwriter or, as he prefers to express it, "that the sugars were received at their insured value" (fol. 27, pages 16 and 17). And this is understood by us to have gone so far as to include even the wet part of the sugar. In other words, evidently the dry sugar exceeded the insured value of it by enough to at least compensate for any loss on such as was wet.

(4.) The appellants, moreover, in their dealings with the cargo underwriter, allowed and paid the original freight from Iloilo, less the trans-shipment freight (P. 17, fol. 28).

(5.) It would seem to be in the nature of an arithmetical conclusion that whatever profit was ever capable of being realized, from so much of the sugar as arrived at Montreal in good condition, was entirely available for realization by the appellants after it came into their possession. There is no pretense in the record of even a fall in the market. Nor is there any pretense, according to our recollection, that what had occurred had wrought the least prejudice or loss to the profits, anticipated by the appellants, from so much of the sugar as thus came to them. How they escape the inference that this part of their profit was saved, it is impossible for us to comprehend.

III.— *Wherever cargo reaches its destination in sound condition, the profits of or upon the cargo are, in the eye of the law, treated, under a valued policy, as having also reached their destination. If the cargo be not wholly lost, the profits cannot be wholly lost. In other words, loss of the cargo is regarded as a prerequisite of loss of profits, independently of any state of market.*

(1) The question, whether or not the possibility of

profit in case of safe arrival is provable or necessary to be proven under a valued policy, was fully considered and decided in the negative in Patapsco Ins. Co. vs. Coulter (3 Peters, 222). The Court could not perceive why, if "profits be the mere excrescence of the principal, as some "judges have said, or incident to or identified with it, as "others have said, the loss of the cargo would not carry "with it the loss of profits. This rule has convenience and "certainty to recommend it." The same principle was announced in the early case of Loomis *vs.* Shaw (2 John. Cases 36), where it was said that "profits are necessarily "incidental and subject to the final disposition of the "goods on which they are expected to accrue. The "plaintiffs in the present case have actually received five-"eighths of the goods and appropriated the proceeds to "their own use. Whether they yielded a profit or sold at "a loss does not appear. It is not material since the "plaintiffs chose to accept them at London and take the "benefit of the market there. They are therefore entitled "to an average loss of three-eighths only." It will be observed that Loomis *vs.* Shaw hinges entirely upon loss of cargo, regardless of whether or not there would have been a profit in case of safe arrival, and regardless also of the fact that the cargo failed to reach its destination, which fact was treated as having been waived by acceptance at an intermediate port. It is also to be noted in that case that there was no limitation of the insured risk to total loss only. If there had been such a limitation, the logic of the case would have led to entire defeat of the claim instead of to an apportionment of profits betweeen cargo saved and cargo lost.

(2.) The two essential elements of the insurance in question were the valuation of profits at $15,000 and the stipulated immunity of the underwriter from liability from anything less than total loss. These two provisions are con-

sistent with, and interdependent upon, each other. They both fit the case of entire loss of cargo and cannot be made to fit the case of partial loss of cargo. The underwriter could not reduce the sum, payable by him, by showing that the profits would have been less or nothing in case of safe arrival. He could not be required to pay the sum insured, or any part of it, because of partial loss.

(3.) The theory of the appellants involves the absurdity that they would have been entitled to demand $15,000 from the appellees provided they could show that, through peril of the sea, they had failed to realize that much of profit on their venture. Logically pursued, this theory would justify recovery of the $15,000 if any proportion, however small, of the cargo had been lost or damaged in the course of the voyage. Their contention is for $15,000, with no credit for profits actually realized by them, from so much of the cargo as escaped destruction, or even injury. At the same time, they contend that this escape of part of the cargo in no wise defeats their claim for total loss.

IV.—*The intervention of Atlantic Mutual Insurance Company, as cargo underwriter, in the saving and forwarding of the cargo, is not available to the appellants to convert into a total loss of cargo and profits, what was in truth partial loss of each and both. Assuredly this intermediation inter alios could not and did not create a liability of the appellees.*

(1.) Mr. Drummond (in the teeth of objection by the appellees) was permitted to deliver a judgment as to what were the legal rights of his company, the appellants, to the effect that "practically the sugar was in the posses-" sion of the Atlantic Mutual Insurance Company, was " their property; but as its coming to Montreal would " have brought it to a place where practically there was

" no market for it, we were *obliged, or considered our-*
" *selves entitled*, to deal with it apart from any question
" of legal rights on an equitable basis. We consequently
" arrived at a settlement as nearly mutual as we could"
(page 18, fol. 29). This deliverance of Mr. Drummond is probably connected with his statement that, if the sugar "had come to a market like this (New York), it could " have found buyers, but in Montreal there was practically " only one buyer" (page 17, fol. 27). In other words, the appellants controlled the Montreal market and were therefore in position to do as they pleased about accepting the sugar. Other parts of his testimony are given the same coloring, of the idea that there was a species of repurchase of the sugar by way of settlement with the cargo underwriter, or its agent, Mr. Darragh. It is all purely colorable or inferential, without the statement of a single fact to support or justify it. Nor can it be necessary to say that such opinions or characterizations are not testimony.

(2.) The dealing with the sugar and the correspondence about it are fully set out in the record. They forbid the hypothesis that, even as between the appellants and their cargo underwriter, there was ever so much as the semblance of an abandonment or surrender of the property by the former to the latter. All that was done by, or on behalf of the cargo underwriter, was manifestly done under the " Sue and Labor " clause of the policy, and was, in the language of the cargo policy (Ex. 9, p. 66), among those " acts of the insured or insurers in recovering, saving and " preserving the property insured in case of disaster;" none of which acts were to " be considered a waiver or " acceptance of an abandonment, to the charges whereof " the said Insurance Company would contribute according " to the rate and quantity of the sum herein insured."

(3.) When the disaster occurred, the *master* arranged

with local fishermen for the saving of cargo by them at one-half of what was saved. (Pages 21 and 22, fols. 34 and 35). This arrangement having resulted in the removal from the wreck and placing in store, and in safety on the shore, of the portion of the cargo, which was ultimately forwarded to Montreal, Mr. Pike, as representative of the cargo underwriter, arrived and took in charge the settlement of the expense accounts. It thus appears that the extrication of the cargo from danger was, by the master of the ship, in the discharge of his duty as agent of all whom it might concern, and with no apparent reference to either underwriter or owner.

(4.) The correspondence, between the appellants and their cargo underwriter appears on pages 40, 41 and 42 of the record (Exs. 5, 6, 6X, 7 and 8), and is sufficintly expressive. On 7th July, 1893, the underwriter acknowledged advices of the disaster, and stated that assistance had been forwarded. On 10th July, the underwriter gave to the appellants their latest information, "that all the "sugar between decks has been saved, and we hope to "have it sent to Montreal." That is to say, the forwarding to appellants was treated as matter of course. On 14th July, the appellants telegraphed as to offers for the sugar, and received the answer that no sale had been authorized; that the master had agreed to give the salvors half, but that all was to be forwarded to Montreal, and the salvage was to be paid in money. By letter of same date, the cargo underwriter explains the talk about sales, as probably due to effort of salvors, and adds that the offer of cash "was *suggested by the master* and acceded to by "us." Shortly afterward appeared the bills of lading, (Exs. 17, 18 and 19, pages 66, 67 and 68), for transshipment of the cargo to Montreal. In these bills of lading, the shippers inserted were the disbursing agents, Harvey & Co., and the nominal consignees were the cargo underwriter. The form thus adopted was perfectly consistent

with the original idea of the forwarding of the cargo to its port of destination by, or at the expense of, the cargo underwriter, free of salvage charges. The final direction of the cargo underwriter as to transshipment, on 31 July, was to "consign sugar to Canada Sugar Refining Com- "pany, Limited, Montreal." (Page 63). The mere form of consignment, by the agents was of course not intended to alter the substance or intent of this explicit direction. There was acceptance and the bills of lading were promptly endorsed by the cargo underwriter, and delivered accordingly. Indeed, as this endorsement was signed by the officer in New York, the bills of lading went to Montreal in that condition, and ready for such delivery.

(5) As between the appellants and their cargo underwriter, some act of abandonment was requisite to the vesting of title in the latter. There was no such act or anything squinting toward it. The underwriter stepped in promptly and took upon himself the burden of the expense account (which by-the-by must ultimately fall upon him) and saw to it that the cargo was hastened forward. He exercised no act of ownership, such as would have been the sending of the sugars to New York where, as the appellants tell us, there was an open market for them. On the contrary, he pushed them forward to Montreal where the appellants claim to have been themselves the only market. From beginning to end there was obviously no thought, in the mind of either party, of anything other than delivery of the goods to the appellants.

(6) The policy is believed to furnish conclusive evidence on this subject (Ex. 9, p. 66). On 25th August, there was an advance of $100,000 "on account" or with certain notes added, $110,000. On September 8th, there was the final settlement, in which $142,748.81 was allowed for the loss and the balance of it, $32,159.07 (after deduction of the previous advance) was paid. The settlement was

clearly and unmistakably a settlement upon the basis of partial loss and nothing else, and was so recorded in the policy itself.

(7) Even if the case had been otherwise, it would not have been competent for the cargo underwriter and the assured to throw their partial loss settlement into a form, effective to charge the appellees with liability for a total loss. It is enough, however, to say that, in so far as concorned the cargo underwriter at least, there was no act on his part, from first to last, indicative of ultimate ownership or disposition of the saved property by him or for his own account and no notice or suggestion, coming to him from the assured, that any such ownership was expected or to be tolerated. The "settlement," spoken of by Mr. Drummond, clearly related to petty details, such as freight and the like. It may be added that the freight settlement itself, by the terms of which the appellants were to bear the original freight charge and not the transshipment freight charge, was consistent with the idea that they were receiving so much of their cargo as was saved, upon the same footing as if it had encountered no disaster.

(8) The Atlantic policy itself provided (Exhibit 9, page 42) that "in case of partial loss by sea damage to dry "goods * * * the loss shall be ascertained by a separa- "tion and sale of the portion only of the contents of the "packages so damaged and not otherwise, and the same "practice shall obtain as to all other merchandise so far as "practicable." So, too, by the marginal clause, after a separate provision for silk, "each invoice of other goods "not less than $5,000, insured value, subject to separate "average as if separately insured, also, each invoice of "less than $5,000, subject to separate average if the "damage amounts to an average on $5,000." The sugar appears to have been subdivided into three separate invoices (Exhibits 1, 2 and 3, pages 38 and 39). Nor is

there any evidence tending to show, or any reason to suppose, that the goods, saved from a particular part of the vessel, were proportionately distributed among all the invoices. The presumption would be to the contrary, in favor of shipment of each invoice by itself.

(9.) Manifestly, the obstacles in the way of forcing upon the cargo underwriter an abandonment of the entire cargo would have been insurmountable, if such an abandonment had been attempted. It was not attempted, nor, in so far as appears, ever even suggested, between this underwriter and the appellants.

V. *The theory of constructive total loss, which prevailed with the District Court and was disapproved by the Circuit Court of Appeals, has no proper application to the present case.*

(1.) We are not aware of any adjudged case to the effect that there is total loss of profits where any part of the cargo has reached its port of destination in safety, without having been subjected to a lawful condemnation and sale at an intermediate port.

(2.) "On the whole, it does not seem that the rule of "constructive total loss of over fifty per cent. of the value "is applicable to a policy on profits in favor of the owner "of the goods under any circumstances." (2d Philips on Insurance, 3d Edition, 356.)

"Indeed, it may be remarked, in general, that as an "abandonment of the profits alone can pass nothing, it "is not easy to see that there can be any effectual aband-"onment of profits, or what would necessarily follow, "that an actual partial loss of profits can be made con-"structive total loss by abandonment. If a part of the "goods, the profits on which are insured, is lost, this is "necessarily a partial loss of the profits." (2d Parsons on Marine Insurance, 170). Waln *v.* Thompson (9 S. &

R., 115) is a leading authority to the same effect and was decided by the Supreme Court of Pennsylvania, of which State the appellees are citizens. In Thom *v.* Smith (3 Caines Rep., 245), the insurance was on profits, from Batavia to New York, valued at $6000. The vessel having been forced to bear away for St. Christopher's and having there become a constructive total loss and transshipment being forbidden by the laws of the place, the cargo was sold at the price it would have yielded in New York, and at a profit on the amount of the sales. The vessel came forward with the proceeds of sales, partly in bills of exchange, not collectible, and partly in products sold at a loss. The opinion of the Court was delivered by Judge Livingston who decided against recovery of any loss under the policy.

(3.) He was of opinion that abandonment was necessary under a profit policy, but did not put the case on that ground. Other authorities have doubted this necessity for, and only for, the reason that abandonment to the cargo underwriter would carry to the latter any right to profits, or, in other words, that ordinarily, such an abandonment might be of no practical value. In a case, however, where there has been no abandonment to cargo underwriter, or where the goods, or part of them, have actually come to the possession of the assured at the port of destination, the reason would seem to fall to the ground and the duty of prompt abandonment would seem to be in full force. In the present case we do not concede that there was any right of abandonment, but if there had been such a right, the absence of it was not excusable.

(4.) Reverting to the cargo itself, it has already been seen that there was no abandonment to the cargo underwriter.

(5.) That abandonment is necessary in all cases, where it is sought to convert a partial loss into a constructive

total loss, is so universally recognized that citation of authority for it would be superfluous. And with regard to the after-thought, that upon arrival at the port of destination the appellants received from their cargo underwriter the saved sugars in the character of purchasers from this underwriter, the language of Judge Livingston (Tom. *vs.* Smith, *supra*) is highly pertinent. He asks whether " as between the owner of cargo and his insurers " of profits, it is reasonable to permit the former to man- " age the property as he pleases and at a period ever so " distant to call on the latter for a total loss." Obviously, no such scheme as that of calling by another name the receipt of their goods by the appellants, at the port of destination, and settling with their cargo underwriter on the basis of partial loss, could operate against the appellees, even if the cargo underwriter had been a party to the scheme, which he evidently was not.

(6.) Moreover, if the cargo policy had been like the profit policy, an insurance against tolal loss only, and if it had contained none of the special provisions already quoted as to adjustment of partial losses under it, there could have been no right of abandonment of the cargo.

(7.) At times a singular confusion of ideas has arisen respecting the fifty per cent rule, as applied to cargo. Where there is liability, under a policy, for partial as well as for total loss, this rule has some support of convenience in the adjustment of the indisputable liability for loss. It would simply permit the assured to promptly realize his money, by debiting the underwriter with the total value and abandoning to him the right to what is saved, instead of postponing payment until the saving has been realized and can be deducted. The liability to abuse has been conceded, but the presumption has been entertained that the final result to the underwriter might be the same in whichever way the account was stated, violent as that presumption too often is in practice.

(8.) Where, however, the underwriter is by express stipulation liable for no partial loss whatever, the case is widely different, and it is a perversion of language to say that the loss of a major part is the loss of all, for the purpose of fastening upon the underwriter a liability which, by the written contract, he has been warranted against.

(9.) Professor Parsons has long occupied the position of the most eminent American authority upon the subject of marine insurance. In his note 4 to Section 2, Chapter 4, 2d Volume, the authorities are discussed with great fullness. And his conclusion is "that the effect of the words, "'partial loss excepted' or 'against total loss only' is to "exempt the underwriter from all loss but an actual total "loss" (page 118). Again in the text he says, "We are, "however, inclined to the opinion that the rule which "would not sanction an action under a policy, restricted "to a total loss by any of the many phrases which are "used for that purpose, unless the loss be total without "abandonment, rests on the weight of authority and on "the stronger reason' (pages 115, 116, and 117).

(10.) There is an undoubted distinction between cases where the voyage is broken up at a port of distress, under circumstances not requiring or admitting of transshipment of the cargo, and the cases where part of the cargo in fact reaches the port of destination, whether in the original vessel or through justifiable transshipment. With regard to this last class of cases, Professor Parsons says, "The rule of fifty per cent. does not, in our opinion, "apply, if any substantial part of the goods insured "arrives in safety at its destined port. Thus if, in course "of the voyage, the ship be stranded and relieved by jet-"tison of eighty per cent. of a shipment and the remain-"ing twenty per cent. arrives in safety, there can be no "converting of this partial loss inio a total loss by aban-

" donment, whether the contribution due would amount " to more than thirty per cent. or less. Nor can a loss of " part of the goods at the port of destination be made a " constructive total loss by abandonment, however large " that part may be " (page 159). As appears by note 3 (page 159), this question arose in the case of the " Paul Jones " and was referred for decision to Professor Par sons, Professor Greenleaf and Hon. Franklin Dexter of Boston, who unanimously decided in accordance with the statement of the text. So in Forbes *vs.* Manufacturers' Ins. Co. (1 Gray, 371), the Court is quoted as saying, " that after any considerable portion of the goods " insured (as in the present case 38 per cent. of the whole " amount of the number of boxes of teas) has arrived at " the port of destination and been landed in a perfect " state; the assured cannot then abandon and recover for " a total loss upon the ground of a loss of more than fifty " per cent. at some former period of the voyage."

(11.) Memorandum articles are by almost all authority put upon the old footing, that the saving of any material portion of them relieves the underwriter from liability. True, in some of the Massachusetts cases, a distinction has been taken between such of these articles as are perishable in their nature and others not supposed to be tainted with this inherent vice. But the distinction is not generally approved. The true ground of distinction, between memorandum and other articles, has been that the former were by the memorandum excepted from particular average or partial loss. This is the view taken by Professor Parson. And " Whatever may have been the motive to " the introduction of this clause in the politics of insurance, " which was done as early as the year 1749, and most " probably with the intention of protecting the insurers " against loss arising solely from the deterioration of the " article by its own perishable quality * * * it is well " conceded, at the present day, in respect to such articles

"that underwriters are free from all partial losses of every "kind, which do not arise from a contribution toward a "general average." (Biays *vs.* Ches. Ins. Co., 7 Cranch, 415. See also Hernandes *vs.* Sun Mut. Ins. Co., 6 Blatchford, C. C., Rep. 317; Saltus *vs.* Ocean Ins. Co., 14 John., 138; Washburn *vs.* Reliance Ins. Co., 82 Fed. Rep., 296; Morean v. U. S. Ins. Co., 1 Wheat., 219, and numerous other cases.) In other words, the exemption from constructive total loss, upon memorandum articles, depends upon the agreement that these articles shall be exempt and not upon the reasons for introducing the agreement into the policy. And although, in the present case, the exemption in the cargo policy was restricted to a percentage, yet the profit policy contained no such limit of restriction and thus comes within the line of decisions upon memorandum articles which are wholly free of particular average.

(12.) But the modern leading cases of Wallerstein *vs.* Columbian Ins. Co. (44 N. Y. 204) and Ins. Co. *vs.* Fogarty (19 Wallace, 640) may perhaps be regarded as decisive upon the point under discussion. In Wallerstein *vs.* Columbian Ins. Co., the insurance was upon coffee and wool and "free from particular average." The vessel, bound for New York, was driven onto the Jersey coast and there totally lost. At full tide, the water was over her main deck and submerged her cargo. A minor part of the wool was saved. The only saving of coffee was by dippers attached to long poles, and what was thus saved was of no value. There appears to have been no claim on the wool. With regard to the coffee, there was no entertainment of the idea that anything short of real total loss would suffice. But it was held that the saving of grains, which preserved the form of coffee but had no value as coffee, did not prevent the loss from being total. The finding of the jury, that the dipping up of these grains was a contrivance of the underwriter and not a salvage effort conducted in good faith, was approved. And Judge

Hunt, delivering the opinion of the Court, reached the conclusion that "the loss of the coffee was total and the right "to recover became fixed when the abandonment was made. "The rescue of a portion of the coffee, with whatever motives "it was done, did not undo what was already done. It could "not convert into a partial loss that which, under the cir- "cumstances detailed, the law adjudged total. It need "not be denied that many of the New York cases give "countenance to the doctrine contended for by the re- "spondent. I have endeavored to show that they may "be sustained without sustaining that doctrine." The Fogarty case cited and followed the Wallerstein case. The insurauce was on machinery from New York to Havana, free from particular average. The machinery consisted of numerous parts necessary for a complete sugar packing machine. When near Havana the vessel was driven on the rocks and filled with water and became a total wreck. All the machinery was of iron. About half of its weight was gotten up, and the remainder left at the bottom of the sea. The parts saved were broken and rusty and the cost of putting them in order, so as to be available for use, was greater than would have been the cost of a new machine. At Circuit, Judge Nelson directed the jury to find "whether any pieces or portion of the "machinery insured arrived at its destination in perfect "condition, so that it could have been used with its corre- "sponding or connecting pieces, had they also arrived in "good condition." In which case the loss would not be total. "But that if every piece of the machinery was so "damaged by the peril insured against as to be entirely "unfit for use on being supplied with its corresponding "or connecting pieces, then there was a total loss of the "subject insured as machinery, although the material "itself might still exist." And in this last case the verdict was to be for a total loss. A verdict for plaintiff was affirmed on Appeal to this Court. In an opinion delivered

by Mr. Justice Miller, the Wallerstein case is given as authority that "the extreme doctrine of an absolute ex- "tinction or destruction of the thing insured is not the "true doctrine, or at least is not applicable in all cases "as criterion of total loss" (page 645). If parts of the machinery "were absolutely lost, and every piece re- "covered had lost its adaptability to be used as parts of "the machine, had lost it so entirely that it would cost "as much to buy a new piece just like it as to repair or "adapt that one to the purpose, then there was a total "loss of machinery. If no piece recovered was of any "use, or could be applied to any use connected with the "machine of which it was a part, without more expense "on it than its original cost, then there was no part of "the machinery saved, however much of rusty iron may "have been taken from the wreck." The Wallerstein case might well perhaps have been planted wholly, as it was mainly, upon the fact that a fraudulent and unjustifiable rescue of worthless remnants is no saving of them in the eye of the law. The Fogarty case proceeded upon the theory that where machinery is the subject insured, remnants saved must be available for use in the proposed machine and must have some value for that purpose. It is enough, however, for our present purpose to call attention to the notable fact that neither case proceeded upon the idea, or admitted of the idea, that where a loss does not extend to at least totality of value, the underwriter, who has undertaken the risk against total loss only or with a warranty against average, can be charged with liability.

(13.) In Adams *vs.* McKenzie (13 C. B. N. S., 422), insurance was upon vessel, and in Greene *vs.* Pacific Mut. Ins. Co. (9 Allen, 217), it was on vessel and outfits and in Snow *vs.* Union Mut. Ins. Co. (119 Mass., 592, it was on vessel. So with Burt *vs.* Brewers' and Maltsters' Ins. Co. (78 N. Y., 400) and Carr *vs.* Ins. Co. (109 N. Y., 504).

And it ought not to be forgotten what little similitude there is between a vessel, as an entity incapable of subdivision for any purpose of use or sale, on the one hand, and cargo composed of separate articles, designed for separate use or sale and having no interdependence upon each other for either use or sale. With regard to Heebner *vs.* Ins. Co., it has been sufficiently discussed in the note of Professor Parsons, already referred to.

(14.) The practice of inserting the word "actual" before the words "total loss" has arisen from the desire for greater precision and for conservatism of the older and more rigid rule from its modification, or supposed modification, by the later authorities. Indeed, the Wallerstein decision has occasioned greater frequency in the introduction of this word "actual." When, however, it is observed that the farthest claim of both the Wallerstein and the Fogarty cases is to consider annihilation of value an equivalent of physical annihilation of the subject insured, and that neither case gave the least recognition to the moiety rule, under insurance against total loss only, it is clear that they are in consonance with the views of Professor Parsons above quoted. It is clear also that in the light of them exemption from total loss is precisely the same thing as exemption from actual total loss where any part of the value has been saved.

VI.—*The arguments, by virtue of which the appellants would appear to have persuaded themselves of the propriety of asserting their claim against the appellees, and which have been used in support of it throughout the litigation must be conceded to be sufficiently ingenious. In our humble judgment they are without merit or substance.*

(1.) The contention that the entire cargo and its appurtenant profits were destroyed by peril of the sea, in face

of the indisputable fact that over three hundred tons of this cargo, with whatever profits were appurtenant thereto, was not destroyed at all and reached the hands of the appellants at the port of destination, has been attempted to be disposed of in the foregoing points.

(2.) The contention that the appellees guaranteed to the appellants a surplus profit, over and above the profit included in the cargo policy, can find no aliment in any decided case or elementary authority. The two policies were in writing and each speaks for itself. There was no reference in either to the other. If the insured cargo had been wholly lost by a peril insured against, each underwriter would have been liable for the sum insured by him without reference to what was paid by the other. The valuation in the cargo policy was of the cargo as such, and, by the well established rules of marine insurance, would have been in no wise available either for or against the assured, with reference to an adjustment of the profit policy valued as such. It has been repeatedly so decided in the cases where there was a difference of valuation in different policies. Under the profit policy it did not matter (otherwise than upon a question of fraudulent valuation, if raised) how much the goods originally cost the appellants nor what was the basis of their reckoning of profits. The valuation closed the door to such an inquiry, so that under the Patapsco decision it would not have been competent for the profit underwriter to show that the hope of profits did not exist or had disappeared or had fallen far beneath the valuation.

(3.) The averment of the libel that on arrival at Montreal the saved sugars were worth "about $20,000" was unimportant for any purpose except as a confession that they had a value, and it was so treated by both parties. Nor did the phrase, "about $20,000," signify anything definite. Moreover, a simple sum in arithmetic, propor-

tioning this amount upon the original invoice cost (which is always the basis of calculation of profits) would of itself demonstrate a conceded profit upon the saved goods. The singular notion of substituting the valuation by the cargo policy, for the invoice cost, as the basis of calculation might sometimes work sad havoc with the rights of an assured. At any rate, it can be dismissed as unprecedented and groundless.

(4.) The contention that the profit on the saved sugars was eaten up, by salvage expenses, is also untenable. It is at war with the other theories of the appellants. They seek to use the cargo policy as the basis of reckoning profits, while, at the same time, they seek to throw it aside in the reckoning of what was saved. Granting that the profit underwriter had no right to interfere between the appellants and their cargo underwriter, or with the salvage efforts of either or both of them, it would seem to be clear that the profit underwriter is chargeable with no responsibility for, or by reason of, these efforts. On no other footing could the appellants excuse themselves from seasonable abandonment to the profit underwriter. The utmost that could be claimed, against the latter, was that he must await results and abide by them, if legitimately and fairly produced.

(5.) Indeed, this last contention involves the absurdity of charging the salvage expenses to each of the two underwriters and thus duplicating them for the purposes of the claim in suit.

(6.) The suggestion, rather than contention, that the saved goods arrived at Montreal in a somewhat damaged condition, is evidently arrived at by confusing the small parcel of twenty tons which had been wet with the main parcel of over three hundred tons which had never been damaged. True, the witness Drummond admits that, in what he calls his settlement with the cargo underwriter,

he made no claim for partial loss on the wet parcel, the meaning of which can only be that the bulk of the sugars was in such perfect condition, and of such value to him, that he was glad to take the whole into possession at the sacrifice of such a claim. The plain business significance of it can only have been that he regarded the dry sugars as of greater value than the cargo valuation of them. Though all this has no real importance upon the point under discussion, it nevertheless tends to dissipate the clouds from over it. We regret to discover a suggestion that the sound sugars were in some undefined way damaged by being mixed. The sacks bought for resacking purposes numbered only 200 (page 66), while the damaged sugars numbered about 800 sacks. Unquestionably the contents of the dry sacks (over 9,000) were never disturbed at all.

(7.) The contention that the profits were wholly annihilated by the original agreement with the salvors must fall within the same category. An award of half the saved goods, in full of their compensation as salvors, might have the arithmetical result to simply halve these saved goods and the profits on them. But the agreement was not carried out. The cargo underwriter prefereed to adjust the salvage in cash out of its own treasury, as was the case with the rest of the expense account. The original salvage agreement was thus superseded, and what went forward to Montreal was the whole and not the half.

(8.) The contention, that there was a virtual abandonment by the appellants to their cargo underwriter, has already been considered. It has no pretense of support except in the opinions or theories of Mr. Drummond, a deeply interested witness, who is unable to give any fact, or even fragment of conversation, to warrant these opinions. They are as clearly and purely constructive as the total loss for which he contends. They are in the teeth

of all the proven facts, including the adjustment of loss recorded on the cargo policy. Even if, however, such a form or name had been given to the transaction, it could by no possibility have altered the fact that the sugars did reach the appellants and were accepted by them upon the basis of a partial loss adjustment. Assuredly such a device, if it had been put in practice, could not have been operative, in a court of equity, to prejudice the position of the appellees.

(9.) In the same connection, it is to be noticed that the scene of wreck was within easy reach of Montreal, off the mouth of the St. Lawrence River; that the salvage efforts proper were under direction of the master of the vessel; that nothing remained to be done by the appellants and their cargo underwriter, or either of them, excepting to settle with the salvors and forward the cargo to Montreal; that even this was done in consultation with, and with the approval of, the master; and that throughout this period the appellants and their cargo underwriter were in regular communication by letter and telegram. It is further to be noticed that not the slightest idea of abandonment was intimated, or is pretended to have been intimated, between the two. The sugars therefore reached their destination unabandoned and undeniably subject to the right of the appellants to insist upon delivery to themselves. It is not conceded that even as to the cargo underwriter there was a right of abandonment. But supposing such a right to have existed, it was for the appellants to elect whether to exercise it or not. Therefore, when the sugars arrived at Montreal, they were the property of the appellants, who, upon any construction of the cargo policy, could refuse to abandon. It is unnecessary to add that, by all authority, there could be no election to abandon after such arrival.

(10.) The contention, that the profit underwriter was

not entitled to an abandonment, has been already referred to. The attempt in the present case, however, is to stretch it to the extremity of enabling the appellants to receive and enjoy a substantial part of the subject of insurance and afterwards recover for a total loss of this subject, and to do this, moreover, without abandonment to anybody.

(11.) The contention, that there is any likeness between merchandise such as the sugar in question and the charter of a vessel, hardly needs to be discussed.

(12.) In short, all the struggles of the appellants to justify their claim revolve about one central notion, that the delivery to them at the port of destination, in safety and in good condition, of a portion of their cargo can, in some way, be treated as not having occurred and that the Courts, in the establishment of equitable principles, have built up a system under which, by some process of ratiocination or construction, this controlling and indisputable fact can be judged to be a nullity.

VII.—*Upon the case as it stands, and in the light of the principles and adjudications which bear upon it, we respectfully submit that the judgment of the Circuit Court of Appeals is correct and should be affirmed.*

CLIFFORD A. HAND,
Of Counsel for Appellees.

CANADA SUGAR REFINING COMPANY *v.* INSURANCE COMPANY OF NORTH AMERICA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 69. Argued October 26, 1899. — Decided January 8, 1900.

This is a case where the owners of a cargo of sugar had insured the same in the Atlantic Mutual Insurance Company, on and before April 29, 1893, at and for the sum of $166,145; and had, on April 29, 1893, insured the

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profits on the cargo against total loss only in the sum of $15,000 in the Insurance Company of North America. On July 6, 1893, the ship, while on her voyage, stranded on the coast of Newfoundland, became a total loss, and the voyage came to an end. The master, representing all concerned, contracted with local fishermen to give them one half of the sugar they could save. On July 8, 1893, the insurers of the cargo, having been notified of the disaster, took charge and possession of the remnants of the cargo, and purchased from the salvors the portion which, under the agreement with the master, was theirs. The sugar was then transported by a vessel chartered by the insurers, and on their account, to Montreal. The value of the sugar that reached Montreal was about $20,000, and the expenses, salvage charges and the additional freight from Newfoundland to Montreal, paid by the Atlantic Mutual Insurance Company, exceeded $11,000. The insurers on the cargo settled with the refining company as for a total loss under its policy for $166,145, and the sugar saved was turned over to the refining company in part settlement of that sum on the basis of the average *pro rata* policy valuation. The value of the entire cargo on April 29, 1893, when the insurance on profits was effected, was alleged in the libel and admitted in the answer to have been about $181,000. The insurance company contested its liability upon the policy on profits on the ground, chiefly, that the receipt by the libellant of a portion of the sugars, viz., about $20,000 in value, prevented the loss from being total within the terms of the policy.

Held

(1) That the saved remnants of the sugar were taken exclusive possession of by the agents of the Atlantic Mutual Insurance Company, were by them forwarded on account of that company to Montreal, and were finally turned over to the Canada Sugar Refining Company, at an agreed valuation, in part payment of the claim of the latter for total loss of cargo;

(2) That the facts disclose an actual abandonment by the Canada Sugar Refining Company, to the Atlantic Mutual Insurance Company, and the acceptance by the latter of such abandonment. Owing to the prompt action of the insurance company in taking charge and control of the cargo, and in adopting the agreement of the master with the salvors, it was not necessary for the assured to go through with all the usual forms of an abandonment. Neither of the parties seems to have acted upon the supposition that any other or more formal act of abandonment was necessary;

(3) That the libellant is entitled to recover the amount of the profits as valued in the policy.

The Canada Sugar Refining Company, a Canadian corporation, on November 27, 1894, filed a libel and complaint in the District Court of the United States for the Southern District of New York against the Insurance Company of

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North America, a Pennsylvania corporation, to recover insurance effected by the libellant with the respondent in the amount of $15,000 on profits on a cargo of sugar shipped on board the British ship John E. Sayre, at and from Iloilo to Montreal, Canada. The respondent answered, the cause came on to be heard upon the pleadings, proceedings and proofs, and resulted, June 15, 1897, in a decree in favor of the libellant for the full amount of the insurance, with interest and costs. The case was taken on appeal to the United States Circuit Court of Appeals, where, on April 23, 1898, a final decree was entered reversing the decree of the District Court, and ordering that the libel be dismissed, with costs in both courts to the appellant.

On the libellant's petition, on May 10, 1898, a writ of certiorari was granted, under which the cause and the record and proceedings therein were removed into this court.

The material facts of the case were as follows:

On April 29, 1893, the respondent company insured for the libellant's benefit:

"$15,000 on profits on cargo sugar; against total loss only; valued at sum insured; shipped on board the British ship John E. Sayre at and from Iloilo to Montreal."

At that time the Sayre was at sea prosecuting the voyage. The libellant had 2462 tons of sugars on board of her, amounting in value to $181,000, and had just completed insurance of the sugars to the amount of $166,145 in the Atlantic Mutual, of which insurance the respondent was informed before its insurance on profits was made. In July following the Sayre stranded on the coast of Newfoundland, and all the cargo was lost excepting about 300 tons, which was saved by the aid of salvors, of which one half went to them as their agreed compensation. The agreement was originally made by the master soon after the stranding; but a few days afterwards the agent of the Atlantic Mutual appeared, to whom the master turned over the salvage operations. He confirmed the previous agreement with the salvors; reimbursed to the master the expenses already incurred by him, and thenceforward, with the libellant's consent and the defendant's

knowledge and acquiescence, took the complete control and disposition of the cargo. The agent eventually bought from the salvors the moieties of the sugars allotted to them under the agreement, and then shipped all the sugar saved to the order of the insurers to Montreal. The value of all the sugar that reached Montreal was about $20,000, and the expenses and salvage charges paid by the Atlantic Mutual thereon, and the additional freight to Montreal, exceeded $11,000, so that out of the whole cargo worth $181,000 less than $9000 net was saved. The Atlantic Mutual settled with the libellant as for a total loss, under its policy of $166,145, and it turned over the sugars saved in part settlement of that sum, on about the basis of the average *pro rata* policy valuation. The respondent contested its liability upon the policy on profits on the ground chiefly that the receipt by the libellant of a portion of the sugars, viz., about $20,000 in value, prevents the loss from being "total" within the terms of its policy.

Mr. Wilhelmus Mynderse for the Sugar Refining Company.

Mr. Clifford A. Hand for the Insurance Company.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The District Court held that, by the stranding of the vessel John E. Sayre, there had been caused, under the provisions of the contract of insurance between the Canada Sugar Refining Company and the Insurance Company of North America, a total loss of profits, and accordingly entered a decree in favor of the libellant for the full amount of the insurance, with interests and costs. 82 Fed. Rep. 757.

The Circuit Court of Appeals, being of the opinion that there had not been a total loss of profits within the meaning of the contract, reversed the decree of the District Court, with directions to dismiss the libel. 58 U. S. App. 22.

This difference of opinion arose from opposite views of the legal conclusion to be drawn from the evidence of the facts

attending the loss of the vessel and its cargo. Did those facts disclose a total loss of the cargo, and, consequently, a total loss of profits? Or did they disclose that, within the meaning of the contract, a portion of the cargo was delivered to and received by the insured at the port of destination, and that, therefore, there was not a total loss of profits?

On February 10, 1893, the ship John E. Sayre, having on board a cargo of sugar belonging to the Canada Sugar Refining Company, sailed from Iloilo for Montreal. By several contracts of insurance between the refining company and the Atlantic Mutual Insurance Company the latter had insured the former against the loss of the cargo in the sum of $166,145. On April 29, 1893, the ship being still on her voyage, the refining company entered into a contract with the Insurance Company of North America, of which the material terms were as follows:

"This to certify that, on the 29th day of April, 1893, this company insured under policy 117,407, made for Robert Hampson, fifteen thousand and $\frac{00}{100}$ dollars on profits on cargo sugar against total loss only, valued at sum insured, shipped on board of the Br. ship John E. Sayre at and from Iloilo to Montreal, and the loss, if any, subject to the terms and conditions of the policy, has been made payable to the order of Canada Sugar Refg. Co. Ltd. on surrender of this certificate."

It was provided in the policy referred to in the certificate that "the acts of the insured or assurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of damage or disaster, shall not be considered or held to be a waiver or acceptance of abandonment;" and likewise, "it is further agreed that if the said assured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance may be deficient towards fully covering the premises hereby insured, without any deduction for the insolvency of all or any of the underwriters, and shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from."

It is admitted that notice of the prior insurance was given to the Insurance Company of North America at the time when it entered into its contract with the refining company; nor does it appear that the insurance company, before the libel was filed, claimed that it was exonerated from any portion of its liability by reason of such prior insurance, or ever tendered a return of any part of the premium by reason of any such alleged exoneration.

On July 6, 1893, the ship stranded on the coast of Newfoundland, and ultimately became a total wreck. The crew left the vessel, but the master remained, and, in the discharge of his duty as agent of all whom it might concern, made an arrangement with the local fishermen for the saving of cargo by them at one half of what was saved. This resulted in removal from the wreck of a portion of the cargo until July 8, when the work was finally abandoned. On that day an agent of the Atlantic Mutual Insurance Company arrived in the interest of that company. He at once took charge, and relieved the master, who, under instructions of the owner of the vessel, turned over the rescued portion of the cargo to the agent. The previous disbursements made by the master, amounting to $200, were paid to him by the agent of the Atlantic Mutual Insurance Company.

The agent thereupon adjusted the claims of the salvors, in pursuance of the agreement made by the master. The portion saved from the wreck weighed about 320 tons, of which about one half was apportioned and set off to the salvors; but nearly all of the sugars so assigned to the salvors were subsequently purchased from them by the agent.

The agent likewise paid to the shipowner his ocean freight, and reconditioned the sugars saved from the wreck, placed them in new bags, and then shipped them to Montreal on the coasting steamer Tiber. The total expenditures of the Atlantic Mutual Insurance Company, in respect of the salvage, the care, reconditioning and forwarding of the sugars, amounted to upwards of ten thousand dollars — not including the ocean freight, nor the freight from Newfoundland to Montreal.

Thus far, in the history of the transactions, there seems to

be a substantial agreement between the statements of the courts below of the facts upon which they based their respective judgments. But we here meet with a difference, which, in the view we take of the case, is of controlling importance.

The District Court, in the opinion by Judge Brown, states that the agent of the Atlantic Mutual Insurance Company, after having settled with the master and with the salvors, "shipped all the sugar saved, to the order of the insurers to Montreal;" and that "none of the sugar ever came to the libellant in the ordinary course of the voyage, or through any delivery to the libellant as consignee by the carrier; but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libellant upon an equitable basis in part payment, and as the equivalent of its value in cash, as any other property might have been received."

The Circuit Court of Appeals, in its narration of events, states that "the master was about to arrange for the transportation to Montreal of the part not going to the salvors, when the Atlantic Mutual Insurance Company, which meantime had been informed of the disaster, intervened and took entire control. That company carried out the agreement made by the master with the salvors, paying them an equivalent in lieu of one half of the sugar saved, and caused the sugar saved to be reconditioned and shipped to Montreal on the steamer Tiber, and delivered upon arrival there to the libellant."

Referring to the pleadings, we find it averred in the libel that the sugar, after having been brought to Montreal by the Atlantic Mutual Insurance Company, "was received by the libellant on account of and in part payment for the loss sustained by the said libellant, under its insurance with the Atlantic Mutual Insurance Company, and that credit was given therefor to the said Atlantic Mutual Insurance Company in the amount at which the said 325 tons of sugar were insured with the said the Atlantic Mutual Insurance Company; and that the market value of the said 325 tons of

sugar in Montreal at the time it was received by the libellant was about $20,000."

The responsive allegations of the answer were as follows: "This respondent further admits and avers, upon information and belief, that from the wreck of said ship John E. Sayre there were forwarded to Montreal, the place of destination, and there delivered to and received by the libellant, about nine thousand nine hundred mats of the said sugar of about three hundred and twenty-five tons' net weight, and of the value of about twenty thousand dollars," and "this respondent, upon information and belief, denies that the sugar so delivered to the libellant was a payment by any underwriter on account of a supposed total loss."

The evidence under this issue, on the part of the libellant, consisted chiefly of the bills of lading, three in number, and dated August 4, 1893, given by the master of the steamer Tiber to Harvey & Co. of St. Johns, N. F., and calling for the delivery of the saved sugar to the Atlantic Mutual Insurance Company at Montreal; and of the testimony of Drummond, of Harvey and of Pike. Drummond testified that he was president of the Canada Sugar Refining Company; that, as such, he made a settlement with a representative of the Atlantic Mutual Insurance Company at Montreal, whereby about three hundred tons of sugar were accepted by the refining company from the Atlantic Insurance Company, at market rates of value, in part payment of the claim of the refining company against the Atlantic Mutual Insurance Company for total loss of cargo; that the sugar was shipped from Newfoundland to the Atlantic Mutual Insurance Company at Montreal, and, in the opinion of the witness, belonged to the insurance company at the time of the settlement.

Harvey testified that he was a member of the firm of Harvey & Co., commission merchants, St. Johns, Newfoundland; that in July and August, 1893, his firm acted for the Atlantic Mutual Insurance Company, under instructions from that company; that his firm acted through Robert G. Pike as their representative; that the sugar saved from the wreck of the John E. Sayre was forwarded to Montreal to the order of the

Atlantic Mutual Insurance Company; that for expenses incurred by his firm in paying the salvors, the master's expenses, and for storing, weighing, reconditioning and reshipping the sugar, their firm received payment from the Atlantic Mutual Insurance Company in the sum of $10,066.97; that, at no time, either before or after the wreck of the John E. Sayre, did his firm have any connection with or receive any instructions from the Canada Sugar Refining Company, or any of its officers or agents, or with the owners of the John E. Sayre.

Pike testified that he was sent by Harvey & Co. to the scene of the wreck; that he there, on July 8, 1893, took entire charge of the sugar that had been saved; that he settled with the master and with the salvors; that he reconditioned the sugar and shipped it to Montreal, to the Atlantic Mutual Insurance Company; that everything he did was in pursuance of instructions from Harvey & Co., as agents of the Atlantic Mutual Insurance Company of New York; that he never at any time had any communication with the Canada Sugar Refining Company, or their officers or agents.

In the absence of any evidence offered under this issue by the Insurance Company of North America, we think it clear that the saved remnants of the sugar were taken exclusive possession of by the agents of the Atlantic Mutual Insurance Company, were by them forwarded on account of that company to Montreal, and were finally turned over to the Canada Sugar Refining Company, at an agreed valuation, in part payment of the claim of the latter for total loss of cargo.

It is also evident, as we think, that the facts disclose an actual abandonment by the Canada Sugar Refining Company to the Atlantic Mutual Insurance Company, and the acceptance by the latter of such abandonment. Owing to the prompt action of the insurance company in taking charge and control of the cargo, and in adopting the agreement of the master with the salvors, it was not necessary for the assured to go through with all the usual forms of an abandonment. Neither of the parties seems to have acted upon the supposition that any other or more formal act of abandonment was necessary.

In *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 394, where the effect of actual abandonment, as dispensing, if accepted, with formal notice, was considered, Justice Story said.

"The latter gives notice of an intention to abandon, because in its terms it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment *in præsenti*, to take effect *in futuro*. Neither the form of the notice, nor the abandonment, is prescribed in the cause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed."

"If an abandonment is wanting in any formality the insurer may waive all objection, and they do this by calling for the proof and acting as if the abandonment were altogether sufficient." (2 Parsons on Maritime Law, 398.)

"The rule dispensing with any particular form of abandonment amounts substantially to the rule that it is sufficient for the assured to signify distinctly that he abandoned, and he could not signify this more distinctly than by claiming a total loss. I therefore conclude that the claiming of a total loss is a sufficient expression of an intention to abandon." (2 Phillips on Insurance, 387.)

As the Canada Sugar Refining Company and the Atlantic Mutual Insurance Company agreed upon an actual abandonment and settled on the basis of a total loss, it is not perceived that, in the absence of any allegation or proof of fraud, the Insurance Company of North America can be heard to raise any question as to the formality of the proceedings.

It was suggested, but apparently was not pressed at the argument, that there ought to have been an abandonment to the Insurance Company of North America. In *Mumford* v.

Hallett, 1 Johns. 433, where there were separate contracts of insurance on cargo and on profits, and where it was contended that the assured, by having abandoned the goods to the underwriter, had disabled himself from recovering the insurance on profit, it was said:

"But admitting that this is to be regarded as a valued policy, it is said that the assured, by abandoning the cargo to its underwriters, has put it out of the power of the defendant to receive any salvage on the profits, and that, therefore, he has no right to recover in this suit. This is a dilemma which the defendant ought to have foreseen at the time of his subscription. He must have supposed there was a policy on the cargo, which, in case of disaster, would naturally be abandoned to those who had insured it. It is idle to complain of what must have been clearly his own understanding of the contract; nor is it reasonable in him to expect, that, for the purpose of recovering on a small policy on profits, a merchant should, by not abandoning the cargo, forego his insurance on that subject."

We shall content ourselves in this respect by quoting the conclusion expressed in 2 Phillips on Insurance, sec. 1503:

"A policy upon expected profits does not seem to offer anything upon which an abandonment can operate, and it does not appear from any speculation, or any judicial opinion, relating to this subject, which has come to my knowledge, that an abandonment of this interest can be of any importance to the underwriters, otherwise than as a notice that a total loss is claimed; and if this is its only effect, an abandonment is not necessary. . . . Under an abandonment of freight, the underwriters may, in some instances, avail themselves indirectly of what has been done towards earning freight. They may receive the freight *pro rata itineris per acti*, for the part of the voyage performed previously to the event on account of which the abandonment is made. But not so of profits; there is no profit, or anything like a profit, *pro rata itineris per acti*, which can be assigned, or proved to be of any value to the insurer. It does not appear, therefore, that an abandonment of profits can be anything more than a nugatory ceremony. . . . It has never been hinted that the assured

can make any claim upon the insurers for the profits on goods abandoned to them, and if he has no such right, he cannot transfer it to the underwriters on profits or to any other persons."

To briefly rehearse the facts, this is a case where the owners of a cargo of sugar had insured the same in the Atlantic Mutual Insurance Company, on and before April 29, 1893, at and for the sum of $166,145; had, on April 29, 1893, insured the profits on the cargo against total loss only in the sum of $15,000 in the Insurance Company of North America; on July 6, 1893, the ship, while on her voyage, stranded on the coast of Newfoundland, became a total loss, and the voyage came to an end; the master, representing all concerned, contracted with local fishermen to give them one half of the sugar they could save; on July 8, 1893, the insurers of the cargo, having been notified of the disaster, took charge and possession of the remnants of the cargo, and purchased from the salvors the portion which, under the agreement with the master, was theirs; the sugar was then transported by a vessel chartered by the insurers, and on their account, to Montreal; the value of the sugar that reached Montreal was about $20,000, and the expenses, salvage charges and the additional freight from Newfoundland to Montreal, paid by the Atlantic Mutual Insurance Company, exceeded $11,000; the insurers on the cargo settled with the refining company as for a total loss under its policy for $166,145, and the sugar saved was turned over to the refining company in part settlement of that sum on the basis of the average *pro rata* policy valuation. The value of the entire cargo on April 29, 1893, when the insurance on profits was effected, was alleged in the libel and admitted in the answer to have been about $181,000.

The error of the Circuit Court of Appeals, as we view the case, was in regarding the portion of the cargo that was saved and paid for by the Atlantic Insurance Company as having been carried to Montreal and there delivered to the refining company as the owner thereof, and as respects which, in that state of facts, the refining company should be deemed to have received profits on a part of the cargo.

Without finding it necessary to enter into a discussion of refined distinctions, considered in some of the cases, between an actual and a technical total loss, we think it evident that the refining company would not receive the indemnity for which it bargained and paid unless it is permitted to recover in the present case. By such recovery it will not receive more than will, with what it has received from the Atlantic Mutual Insurance Company, make up its whole loss.

It certainly cannot be successfully claimed that, in order to recover, the refining company was bound, in this suit on a valued policy on profits, to put in evidence to show that it would have received profits if the voyage had been completed, and the entire cargo had arrived safely. Such a contention was considered and determined in *The Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222. That was a case where the ship Mary was proceeding on a voyage from Philadelphia to Gibraltar and ulterior ports with a cargo of flour. There was an insurance on profits in the sum of five thousand dollars. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. In an action brought on the policy of insurance on profits in the Circuit Court of the United States for the District of Maryland, the court was asked to instruct the jury that as the assured had offered no evidence that the flour, if delivered and sold at Gibraltar, would have yielded a profit, they were not entitled to recover. The refusal of the court so to charge was approved in this court, in an opinion by Mr. Justice Johnson, from which we quote, as follows:

"The third prayer for instructions is in these words: 'That the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and that, therefore, they were not entitled to recover.' This was refused, and the question is, whether the defendants were entitled to it, as prayed.

"This instruction presents two propositions: 1. That it was necessary to prove loss of profits; otherwise than by the loss of the cargo. 2. That the plaintiff was limited to proof of profits on a sale at Gibraltar. With regard to the second it is clear

that the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty.

"Courts of justice have got over their difficulties on the question whether profits are an insurable interest, but how and where that interest must be established by proof, in case of loss, is not well settled. Here again there appears to be a conflict between the British and American decisions.

"The earliest of the British decisions, that of *Barclay* v. *Cousins*, 2 East, 544, certainly supports the doctrine that the profits sink with the cargo, or at least that the loss of one is *prima facie* evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court, and the recovery was had in that case without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson* v. *Margetson*, 2 East, 549, of which a note was given in that case, the recovery was also had without proofs that the profits would have been made, or any other proof than an interest in and loss of the cargo; and Lord Mansfield seems to have suggested the true ground for dispensing with such proof, to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port.

"The two subsequent cases which are cited in the elementary books to sustain the contrary doctrine are not full to the point. In that of *Hodgson* v. *Glover*, 6 East, 316, there was another question of as great difficulty, to wit, Whether, in a clear case of average loss, the plaintiff could recover as for a total loss, or recover anything without evidence to determine the average. Of the four judges who sat, two decided against the plaintiff, upon the one ground, and two upon the other.

"In the second case, that of *Eyre* v. *Glover*, 12 East, 218, although the point was touched upon in argument, yet the court neither expressly affirm nor deny it; it was not the leading question in the cause; and at last judgment is rendered for

plaintiff without requiring such proof. But the case of *Mumford* v. *Hallett*, 1 Johns. 439, goes further. It was a case of insurance on profits, in which there was no evidence given that profits would have been made upon an arrival, nor was any other loss proved than as an incident to the loss of the goods. On that state of facts, Livingston, Justice, who delivers the opinion of the court, remarks: 'It does not follow that a profit will be made if the cargo arrived, yet its loss would give a right to recover on such a policy.' There were other questions in the case; but, after all were settled, this principle was essential to the plaintiff's right to recover. In the case of *Fosdick* v. *The Norwich Insurance Company*, decided in the Supreme Court of Errors of Connecticut, the question was moved in argument that to justify a recovery the plaintiff must show that profits would have accrued upon safe arrival of the goods; but the language of the court, in expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the proof of loss as to the insurable interest. Yet the right of the plaintiff to recover being affirmed in that case without other proof than the loss of the goods, it would seem to be an authority for the doctrine that no other was necessary.

"The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the cause, the Chief Justice asks, 'if profits are anything more than an excrescence upon the value of goods beyond the prime cost?'

"As to the American cases, Mr. Phillips quotes that of *Loomis* v. *Shaw*, (if I understand his language as he meant to use it,) as going farther than the case warrants. 2 Johns. Cas. 36. The court waives the question now under consideration by suggesting that the defendant had waived it by an act of his own.

"In the case of *Abbott* v. *Sebor*, 3 Johns. Cas. 39, which was a motion for a new trial, the decision turned chiefly on the question whether the court had misdirected the jury in instructing them that the plaintiff must recover the whole

sum insured on profits or nothing — that is, that he could not recover for an average loss. The question, if proof that profits would have been made had the vessel arrived in safety was necessary to his recovery, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required beyond the loss of the goods on which the profit was expected. But the authority amounts to no more than an implication.

"We must now dispose of the question upon reason and principle; and here it seems difficult to perceive why, if profit be a mere excrescence of the principal, as some judges have said, or an incident to or identified with it as others have said, the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it, of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed; the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it would have been subjecting the rights of the plaintiff to mere mockery."

The conclusion thus reached has never been disturbed in this court, and is the prevalent doctrine in the United States. The American rule and the reason for it are thus stated in 2 Phillips on Ins. section 1209:

"Under a policy on the profits of a cargo on a voyage from Philadelphia to the Mediterranean, and thence to South America, valued at $20,000, the ship and cargo were destroyed by fire at Gibraltar. It was held (*Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222) that the assured was entitled to recover the whole amount of the valuation against the underwriters, without proving that there would have been any ultimate profit on the voyage, if it had been pursued without interruption or disaster. And this is the prevalent doctrine in the

United States. . . . The profit, then, which is the subject of a policy upon this interest is the excess of the value of the subject at the port of destination over its value at the shipping port. It is only in case of loss that the policy is of any avail to the assured, and he wishes that it may avail him in a total as well as partial loss. In the latter case, the loss may be adjusted, under an open policy, on the English doctrine, by ascertaining how much less the profit is than it would have been if the goods had arrived sound.

"But in the case of a total loss by the ship never arriving, it is very difficult to say what the profits would have been had the ship arrived, since it is not possible to determine when she would have arrived; and if this difficulty is got over by assuming some probable time, there must often be a long delay in hearing from a distant port of destination, and learning the state of markets. The prompt return of his capital to the assured in case of loss, which is a very important consideration in insuring, requires a valuation of the profits, in preference to an open policy subject to an adjustment upon the English doctrine of determining the amount by the state of the market at the port of destination. The same difficulty does not arise in case of a loss on goods, which is adjusted on the invoice value. There does not appear to be any way of avoiding this difficulty but by a valuation, and this is felt in practice, since policies on profits are usually valued."

Agreeing, as we do, with the view of the evidence taken by the District Court, to wit, that none of the sugar ever came to the libellant in the ordinary course of the voyage, or through any delivery to the libellant as consignee by the carrier, but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libellant upon an equitable basis in part payment, and as the equivalent of the value in cash, as any other property might have been received, the legal conclusion that we reach is that the libellant is entitled to recover the amount of the profits as valued in the policy.

The appellees claim that they took no part in the settlement

between the cargo insurers and the libellant, and the doctrine of *res inter alios* is invoked.

But they had knowledge of the prior insurance, and were bound to know that, in case of disaster, there was the right to abandon. There is evidence that they were informed of what was going on between the other parties concerned. They do not impugn, by allegation or evidence, the fairness and good faith of that transaction, nor do they claim that it was conducted with a view to prejudice them.

They plant their defence solely on the proposition of fact that a sound portion of the cargo reached the port of destination in due course, and was there delivered to the libellant as consignee — a proposition of fact, as we have seen, not sustained but refuted by the evidence.

Accordingly, the decree of the Circuit Court of Appeals must be

Reversed, with costs, and the decree of the District Court for the Southern District of New York is affirmed.